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THE RIGHT TO TRUTH – A ‘GENTLE CIVILISER’ OF AN UNPREDICTABLE PAST

Master thesis

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Introduction: from Truth to Identity to Security

“Try to remain truthful. The power of truth never declines. Force and violence may be effective in the short term, but in the long run it’s truth that prevails. Being honest and truthful engenders trust and trust leads to friendship and a good reputation. Because we all need friends, honesty and transparency are a basic aspect of human nature.”

Dalai Lama, 26/02/2014 on Facebook

Convert to my new faith crowd
I offer you what no one has had before
I offer you inclemency and wine
The one who won’t have bread will be fed by the light of my sun
People nothing is forbidden in my faith
There is loving and drinking
And looking at the Sun for as long as you want
And this godhead forbids you nothing
Oh obey my call brethren people crowd

Radovan Karadzic¹

The spirit of the former quote seems advisable and may even practically avoid the fatal catharsis of the latter. But does it have any resemblance in international (human rights) law? Is it possible to stop a satanic leader in his manipulation of people before it is too late without undemocratically restricting the freedom of expression?

We are witnessing a situation today where a part of an independent country is being annexed not in a ‘classical’ way, i.e. foremost with tanks and soldiers and military force but mainly via propaganda, by invoking national tensions until violent protests, by falsifying facts and manipulating history.² Ukraine and Georgia are two recent examples of neo-imperialist spirit dominating Russia’s national ideology and foreign political line of actions. As Edward Lucas argues, “He [Putin, *M.R.*] is prepared to make his people suffer economic pain and risk war for what he *believes* is their *national interest*.”³ [emphasis added, *M.R.*]

The national interest of any country, besides the social welfare and security of the people, is formulated and influenced by the leaders, by policies and legislature, reflecting the political

¹ Radovan Karadzic was a psychiatrist, not just a tough political leader and war-manager, and, as Slavoj Žižek claims, his poetry “should not be dismissed as ridiculous: it deserves a close reading, since it tells us something about the way ethnic cleansing works.” Žižek, S., “The military poetic complex”, London Review of Books. Vol. 30 (16), 2008 (English), available at: <http://www.egs.edu/faculty/slavoj-zizek/articles/the-military-poetic-complex/> [accessed 18/04/2014]

² See e.g. Applebaum, A., “A fearful new world, imperiled by Russia’s subterfuge”, Washington Post, 17/04/2014, available at: http://www.washingtonpost.com/opinions/anne-applebaum-a-fearful-new-world-imperiled-by-russias-subterfuge/2014/04/16/69a28170-c584-11e3-9f37-7ce307c56815_story.html [accessed 18/04/2014]

³ Lucas, E., “I hope I’m wrong but historians may look back and say this was the start of World War III”, Daily Mail, 16/04/2014, available at: <http://www.dailymail.co.uk/news/article-2605578/Edward-Lucas-I-hope-Im-wrong-historians-look-say-start-World-War-III.html#ixzz2zEMOsB4i> [accessed 18/04/2014]

settlement of a time. The process of such formulation is largely directed on influencing people's attitudes and beliefs, people's identity as the basis for a collective national identity legitimising the national interest and state's actions abroad.⁴ Russian state-controlled media has been pretty successful in presenting Ukrainian and Georgian events as being in absolutely legitimate national interests of Russia, which the hypocritical West simply does not understand or does not want to understand. But this success rests on a longer, wider and deeper process of national identity building, the historical consciousness and collective public memory of Russian people, World War II or Great Patriotic War (as it is called in Russia) and Russia's role as a member of anti-Hitler coalition together with Orthodox heritage forms a central part of it.⁵

History, the narrative created of it, forms an enormous part of both individual and collective identity of any country: "History makes a nation," has been explicitly claimed by some authors⁶ and its importance in the present confirmed by others.⁷ It is a normal part of cultural development of any nation to build and sustain the identity of the country, provide basis for patriotism, feeling of belonging. Thus, in the context of constant informational confrontation it has, maybe more than ever, become a question of security. As argued by former Estonian minister of defence, Jaak Aaviksoo, acknowledging and practicing the right to informational self-determination by states is necessary for psychological self-defence because instead of conventional attacks the informational ones are much more evident today, the informational

⁴ See e.g. Rosenau, James N. "Governance, Order, and Change in World Politics" in Rosenau, J. N and Czempiel, Ernst-Otto "Governance without Government: order and Change in World Politics", Cambridge 2005, pp 1-29, pp 14-15: "The numerous patterns that sustain global order can be conceived as unfolding at three basic levels of activity: (1) at the ideational or inter-subjective level of what people dimly sense, incisively perceive, or otherwise understand are the arrangements through which their affairs are handled; (2) at the behavioural or objective level of what people regularly and routinely do, often unknowingly, to maintain the prevailing global arrangements; and (3) at the aggregate or political level where governance occurs and rule-oriented institutions and regimes enact and implement the policies inherent in the ideational and behavioural patterns. [...] It should be stressed that, whatever may be the degree of orderliness that marks global affairs at any period in history, it is a product of activity at all three of these levels."

⁵ See e.g. Von Gall, C., "Gesetzliche Zementierung eines geschichtlichen Weltbildes in Russland - Die Gesetzentwürfe über die Haftung für die Verfälschung der Geschichte", in Von Gall, C., Nußberger, A., "Bewusstes Erinnern und bewusstes vergessen", Mohr Siebeck, Tübingen, 2011, pp 287-315

⁶ Appleby, J., Hunt, L., Jacob, M., "Telling the Truth about History", WW Norton & Company, New York-London, 1995, p 91

⁷ See e.g. Möller, H., „Mälestused, ajalugu, identiteet" ("Memories, History, Identity"), Eesti Päevaleht, 01/08/2006, available at: <http://epl.delfi.ee/news/kultuur/malestused-ajalugu-identiteet.d?id=51045924> [accessed 18/04/2014] (original article in Aus Politik und Zeitgeschichte, Vol. 28, 2001, translation into Estonian by Külli-Riin Tigasson); Halbwachs, M. "On Collective Memory", University of Chicago Press, Chichago-London, 1992, reference in Kaarlõp-Nani, H., „Mälukonfliktide ületamise võimalusi ajalooõpetuse kaudu" ("Possibilities to Overcome the Conflicts of Memory through the Teaching of History"), Master thesis, Tallinn University, Institute of History, supervisor Mare Oja, MA, Tallinn, 2013, p 6 (footnote 12), p 8 (footnote 20)

opposition always exists and “the ‘sword of truth’ is not enough for self-defence.”⁸ In this line he states:

“We are slowly accepting the idea that people have the right to information self-determination. This right could, and should, be extended to all self-aware entities, which may include many people – for example, families, communities, villages, clubs and definitely nation states. *A nation state’s right to information self-determination means, inter alia, that it has the right to secrets and lies.*”⁹ [emphasis added, M.R]

I do agree that states have the right to informational-emotional self-determination in a sense described here but disagree that it entails the right to secrets and lies. In fact, I think namely the prohibition of deliberate lies (manipulation of facts) and limits on legitimately declaring certain information a state secret, constrain the self-determination in question.

It should be admitted that the strength and security of a state lays first and foremost in people, the people who affiliate themselves with a state through their (collective) national identity. It might be said that wounds in this part of security are the most substantial ones – there is no self-defence without people and in the end no justification for the existence of sovereign power not representing the people. The latter is basically what Russia claims to be the justification for her intervention in Crimea and Eastern Ukraine – ‘Bandera’ government (‘junta’) and ‘fascist guerillas’ are not representing or protecting Ukrainians, the brethren Slavic nation who needs the protection from Russia, demonstrating their respective will on ‘referendum’ and on the streets.¹⁰

Another important argument, strongly connected to and shaping the former, is historical – Crimea is historically part of Russia and taking it back is a matter of fixing historical injustice.¹¹ If we admit that the state has an unlimited right to ‘secrets and lies’, we should tolerate the propaganda-war waged by Russia as a legitimate means for protecting its national identity, exercising ‘informational-emotional self-determination’. We would admit that international law, including international human rights law, is impotent to act proactively, before people have already suffered. Thus, dealing with the consequences does not change the

⁸ Aaviksoo, J “Information Confrontation and Self-defence” Diplomaatia, March 2011.
<http://www.diplomaatia.ee/en/article/information-confrontation-and-self-defence/> [accessed 15/03/2014]

⁹ *Ibid*

¹⁰ See speech of Vladimir V. Putin on Crimean annexation that was interrupted with applause at least 30 times, available at: http://www.youtube.com/watch?v=REX_9TK0H08, with English translation: <http://www.youtube.com/watch?v=PDLwu4E35us> [accessed 18/04/2014]

¹¹ *Ibid*

“internal legitimization”¹² created inside a country for such actions, it does not stop the leaders from strengthening and sustaining it, and eventually from keeping repeating the same behaviour.

This master thesis is about the part of the identity creation or nation building¹³ – historical narrative. In the described framework it explores, how far can the state go in exercising its right to informational-emotional self-determination (or collective national identity building) without infringing individuals’ rights and its global duties as a member of international community? How far can the politicising of the history go, where could be the ‘red line’?

The focus of this research lays on the crimes against humanity of 20th century. It has been argued that commemorative practices are not based on “heroic myth of national sacrifice and greatness” anymore but rather on acknowledgment of “the forgotten, the mistreated, the enslaved, and the murdered.”¹⁴ The historical knowledge substituting personal memories, but also the omission of it, “is always reconstructive or warning,” the aura of museums, exhibitions, memorials etc. “can and must be used as a warning but it cannot be done without the information.”¹⁵ Genocides and other crimes against humanity that happened in 1990’s (like Srebrenica and Rwanda), the on-going debate on earlier atrocities, including the project of seeking for a ‘common European identity’ and the actions of Russia that rest on the support of many Russian citizens based on their national identity, sadly-vividly illustrate the importance of the need for such historical knowledge.

Does this need have a reflection in international law? The research question of this thesis is: *Is there a right to truth about the crimes against humanity in international (human rights) law* as could be subsumed from the developments and understandings of history and the task of

¹² See Grant, R. W and Keohane, R. O “Accountability and Abuses of Power in World Politics“, American Political Science Review, Vol 99, 2005, pp 29-43, p 35: “If the powerful acting state controls substantial material resources, including force, and if it has strong internal legitimacy – so that its public does not react negatively if its leaders are criticized abroad – it may be largely immune from sanctions, as the United States was in 2003.”

¹³ Here understood narrowly, “as a process which leads to the formation of countries in which the citizens feel a sufficient amount of commonality of interests, goals and preferences so that they do not wish to separate from each other,” conducted mainly by means such as education, media and cultural policies and administrative measures (e.g. language and minority policies). See e.g. Alesina, A. and Reich, B., “Nation Building”, latest Revision: August 2013, available at: <http://faculty.chicagobooth.edu/workshops/econ-policy/PDF/Nation%20Building.pdf> [accessed 20/04/2014] About the importance of nation building in a wider sense to national and international peace and security see e.g. Stephenson, C., “Nation Building”, Beyond Intractability Resources, January 2005, available at: <http://www.beyondintractability.org/essay/nation-building> [accessed 20/04/2014] The terms ‘nation building’ and ‘national identity creation’ will be used as synonyms if not otherwise expressed.

¹⁴ Torpey, J., “Introduction: Politics and the Past”, in Torpey, J. (ed.), “Politics and the Past: On Repairing Historical Injustices”, Rowman & Littlefield, Oxford, 2003, pp 1-26, p 24

¹⁵ Möller, H., 2006

historians after the World War II, guided by the “duty to remember”?¹⁶ In that way this thesis also answers the question of what does the ‘duty to remember’ actually mean, as posed (although not in strictly legal context) by Hent Kalmo: “[W]hat could a command ‘Remember!’ mean?” and how does that interact with the need to forget in order to overcome the pain of the past injustices?¹⁷ My hypothesis is that states are not completely free to create any historical narrative concerning past atrocities, irrespective of historical facts.

The questions addressed in this thesis – What is the minimal level of truth that shall be provided about past tragedies? Who can claim that? How to understand the notion of historical truth in the context of many different interpretations of historical events? – are not *expressis verbis* dealt with in any of the so-called hard law document of international law, neither is the concept of the right to truth (beyond transitional period). This research aims at touching upon limits of human rights law, strongly deriving from the idea of law being an art of goodness and justice, the perspective of natural law, using contextualisation and systematic approach, incorporating perspectives of philosophy, history and social-political studies.

I will focus on two dark historical inheritances of Europe – Holocaust and Communist crimes – that form the debate of ‘common European memory’ and are the centre of national identity creation in Russia. This is of a particular importance also from the perspective of Estonian national security, identity, integration and citizenship policies because of the proven fact¹⁸ that the loyalty and integration of the Russian-speaking minority is very much related to the different interpretation of the history of the World War II – this is one of the most crucial factors separating the Estonian society into Estonian and Russian communities. The riots around the replacement of the statute of the Bronze Soldier in 2007 and events taking place in Ukraine provide vivid examples, how historical consciousness may become a question of security not only for one country but for the Europe or even the whole world. Because of those reasons, Russian memory politics and law is taken as a case study for this research.

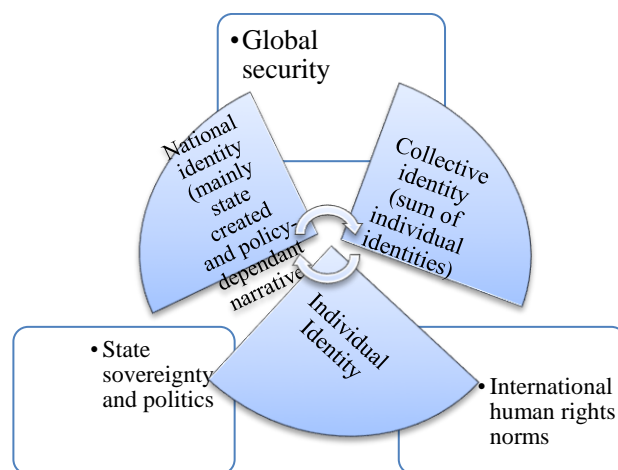
¹⁶ “‘Duty to remember’ is translated from the French expression “Devoir de memoire”. It normally means the duty, the advice or the obligation, for the sake of human conscience, not to forget Nazism’s horrendous genocide which killed 6 million Jews in the Second World War.” Vietnamese and American Veterans website, <http://www.vietamericanvets.com/Page-PointofView-DutyToRemember.htm> [accessed 19/04/2014]

¹⁷ Kalmo, H., „Kohustus mäletada, kohustus unustada“ (“Duty to Remember, Duty to Forget”), *Vikerkaar*, No. 10-11, 2009, pp 109-121, p 110 [my translation from Estonian]

¹⁸ See e.g. Kirss, L. „Eraldatud haridus – eraldatud kodanikud?“ (“Separated Education – Separated Citizens?”), *Praxis*, 2010, available at: http://www.praxis.ee/fileadmin/tarmo/Projektid/Haridus/Euroopa_haridusprogrammi_mojude_hindamine/DEDC/Toimetised_1_2010.pdf [accessed 15/03/2013]; Roos, R. „Eesti ja vene koolide noorte erinevad arusaamad ajaloost Teise maailmasõja näitel“ (“Different Understandings of History of the Students of Estonian and Russian Schools on the Example of the History of the Second World War”), *Haridus*, Vol. 2, 2010, lk 19–21

International human rights law as the strongest discipline restricting state sovereignty on the ground of the rights of individuals, thereby also very much touching upon the identities of people and collectives, is a suitable framework for dealing with the stated questions. The biggest and most disputed paradox of human rights is their principal universal nature vs. culture-determined particularity in implementation: The Vienna Declaration of 1993 states that the universal nature of human rights (being “the birthright of all human beings”) “is beyond question” but at the same time that “the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind.”¹⁹

In a very interesting master thesis²⁰ about the local or cultural contestation of human rights in Russia it is claimed that legal approach is not enough to explain the variety of ways human rights are perceived among different countries and parts of the world. I agree that to understand and efficiently implement human rights it is necessary to go beyond legal sphere. However, I want to ask and critically evaluate if the vocabulary and concept of human rights has been fully used or maybe there are some underemployed possibilities. I do not believe that politics can be regulated from inside politics as suggested in the referred thesis – that makes a vicious circle, where implementation of human rights depends solely on the political will and power-struggles. Successful cultural contestation of human rights presumes political will but cannot depend solely on that, it still needs enforcement and certainty from law as a substance controlling and limiting political arbitrariness. In the following framework:



¹⁹ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, A/CONF.157/23 art I (1) and (5). <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> [accessed 14/02/2014] (hereinafter *Vienna Declaration*)

²⁰ Preclik, P., “Culture Re-introduced: Contestation of Human Rights in Contemporary Russia”, E.MA Programme master thesis, supervised by Dr. iur Lauri Mälksoo, 2007/2008 in Tartu, an article published in Mälksoo, L. and Simons, W., B. (eds.), “Russia and European Human Rights Law: Progress, Tensions and Perspectives”, *Review of Central and East European Law Special Issue*, Vol. 37 (2-3), Martinus Nijhoff Publishers, Leiden-Boston, 2012, pp 173-230.

I try to answer the stated question from the perspective of history as a major part of identity formation by interpreting it in the context of human rights law.

Sources, Limitations, Methodology and Structure

The main sources for the research are international (human rights) treaties, the so-called soft-law, relevant jurisdiction of international courts and legal literature but also academic literature in the fields of history, legal philosophy, political and social studies. The main perspective and research question consider human rights, studying of other sources is needed to provide a comprehensive answer to the questions posed. It is not in the scope of this thesis to give a detailed answer to socio-psychological questions about identity creation or approach the theories of self-determination or global governance – these are the surrounding and connected areas around the central question about the right to (historical) truth in the discipline of human rights. Necessary abbreviations and simplifications for limiting the focus of the study may therefore be made concerning the surrounding fields.

The thesis is not aimed at establishing a common historical truth. It is not possible, nor advisable. It is clear that there is no one and only narrative historical truth for the whole world but always several stories subject to individual interpretations, deriving from different perspectives. From the international-legal point of view the question is about the core minimum as can be interpreted from the existing legal approaches to the right to truth in the context of transitional justice and to the historical truth in peace-time, involving freedom of expression and information. For determining this core minimum content of the right, the philosophical approaches to the notion of truth will be examined.

Besides introduction and conclusion the thesis is divided into three parts: the first chapter takes an insight into the content and development of the right to truth as an independent notion, discussing its applicability as a customary norm or general principle of human rights law, and the notion of truth in (international) legal sphere; the second chapter discusses the notion of historical truth, the application of the right to truth beyond transitional period, having a look at the interconnected process of identity formation, interaction of history and law, the application of historical truth in legal sphere and *vice versa*, depicting concrete examples of such interaction – the memory laws, and the project of the ‘common European memory’ from its legal side; the third chapter takes Russian identity building under closer observation, providing thereby a concrete exemplary case for analysing whether a country complies with the right to truth in its national identity formation process.

The three parts form a whole through the research question of this thesis. To understand the origins and legal essence of the right to truth, transitional justice literature and legal acts, where the concept finds explicit mentioning and examination, needs to be studied. To establish the existence and nature of the right to truth in international human rights law as a substance restricting political manipulation of historical truth, it is necessary to deal with ‘duty to remember’ in its today’s connotations and expressions – memory laws and historical narrative creation in the light of freedom of expression and the right to information. For providing content and limits of the right to truth, the notion of truth is shortly examined also from philosophical perspective. As for the practical side, concrete example of nation building in modern Russia will be elaborated.

1. The Right to Truth

“Then you will know the truth, and the truth will set you free”
John 8:32

The right to truth has not been explicitly established in international treaty law. But, as will be depicted below, it finds mentioning in quite many legal documents characterized as ‘soft law’ and court decisions of various international and national courts, it is essentially related to the scope and application of many *jus cogens* norms and it derives from the generally accepted values and virtues like humanity and justice. In order to place the notion of the right to truth in the system of international (human rights) law and try to clarify the legal content and contours of that right, some general comments on sources of international law shall be made.

The only international legal instrument establishing a list of the sources of international law is the Statute of ICJ. Article 38 (1) of the Statute enlists the sources of international law as following:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) [...] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²¹

²¹ United Nations, *Statute of the International Court of Justice*, 18 April 1946, art 38 (1), available at: <http://www.refworld.org/docid/3deb4b9c0.html> [accessed 20 March 2014]

For further purposes of this research two questions should be discussed: first, the hierarchy between these sources; and second, as the right to truth finds mentioning in many non-binding documents, the status and role of the so-called soft law in the system of international law.

Contrary to the national law that is traditionally a vertical system where fundamental values of society possess a constitutional status and lower legal and administrative acts must comply with the higher ones, international law has traditionally been considered “a horizontal system of legal norms.”²² Based on the Statute of ICJ and the principle of equal sovereignty of states, it has been argued that “there is no hierarchy and [...] logically there can be none: international rules are equivalent, sources are equivalent, and procedures are equivalent, all deriving from the will of states.”²³

It is quite obvious that a total lack of hierarchy would eventually lead to anarchy.²⁴ Very widely, this assumption could be regarded as the basis and reason for the more universality-based developments²⁵ in international law, the most eminent example of which is the emergence of *jus cogens* norms, that generally possess an *erga omnes* character.²⁶ Article 53 of the Vienna Convention on the Law of Treaties sets a strong constraint on the freedom of contract and the will of states in making international law, declaring that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”²⁷ According to the same article “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from

²² De Wet, E. and Vidmar, J. (eds.), “Hierarchy in International Law: The Place of Human Rights”, Oxford, Oxford University Press, 2012, p 1, referring to Dupuy, P.-M., “Droit International Public” (9th edn Dalloz, Paris 2008) 14–16 (footnote 5)

²³ Shelton, D., “Normative Hierarchy in International Law”, The American Journal of International Law, Vol. 100 (2), 2006, pp. 291-323, p 291, referring to Dupuy, P.-M., “Droit International Public” (9th edn Dalloz, Paris 2008) 14–16 (footnote 3)

²⁴ “The opposite of hierarchy is anarchy, the complete absence of (any) hierarchy ...” Koskinniemi, M., “Hierarchy in International Law: A Sketch”, European Journal of International Law, Vol. 8, 1997, pp 566-582, p 571. See also Nieto-Navia, R., “International Peremptory Norms and International Humanitarian Law”, Hague, 2001, p 4, available at: <http://www.iccnw.org/documents/WritingColombiaEng.pdf> [accessed 22/03/14] In fact, Bodin, traditionally considered an advocate of absolute state sovereignty, also recognized that the sovereign was always subject to the overriding ‘laws of God,’ natural law and the law of nations.”

²⁵ Appearing in a very early period of international law and represented already by the ‘father of international law’, one of the most famous natural law scholars, Hugo Grotius. “Grotius stated that principles of natural law were so immutable that not even God could change them.” See Nieto-Navia, R., 2001, p 3, referring to *H. Grotius, “De Jure Belli Ac Pacis Libri Tres” (1625), I, Ch. I, X, 5.*, footnote 3

²⁶ On distinction of *jus cogens* and *erga omnes* norms see e.g. Nieto-Navia, R., 2001, p 14. Referring to Ian Brownlie the author explains that *erga omnes* norms are “[o]pposable to, valid against, ‘all the world’, i.e. all other legal persons, irrespective of consent on the part of those thus affected.” He also notes that “although all norms of *jus cogens* are enforceable *erga omnes* not all *erga omnes* obligations are *jus cogens*.”

²⁷ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 21 March 2014]

which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²⁸

It is important to note that, although deriving from the same idea of a ‘common good of humanity’ and *jus naturale necessarium* as concepts above positive law, *jus cogens* norms, differently from natural law, “form an integral part of ‘positive’ law itself and are defined and recognized by international law.”²⁹

For establishing a framework for further analysis in the context of purposes and limits of this thesis, I will conclude with a few standpoints that summarise the discussions and locate human rights in the system of international law.

First, current international system cannot operate on the basis of states’ consent only. There is clearly a need to guarantee the effectiveness of international law and protect it from sabotage by “recalcitrant states [...] seeking to denounce, or acting to violate multilateral agreements that reflect widely and deeply held values, such as those guaranteeing human rights or expressing humanitarian law” and may thereby “pose risks to all humanity.”³⁰ As the consent-based international legal system lacks mechanisms to “override the will” of such states, I find it justified and necessary to compensate that “through the doctrine of peremptory norms or universal law applicable to all states” and, in some circumstances, “expanding the concept of international law to include soft law.”³¹ So, one of the underlying assumptions of this research is that there is a hierarchy in international law and *jus cogens* norms form the top of it.

Second, based on the UN Charter³², human rights, together with the prohibition of the use of force and people’s right to self-determination form the core of the international legal system. Article 1 of the Charter establishes the purposes or “common ends” of the United Nations, naming the maintenance of “international peace and security”, development of “friendly relations among nations based on respect for the principle of equal rights and self-

²⁸ *Ibid*

²⁹ Nieto-Navia, R., 2001, p 4

³⁰ *Ibid*

³¹ *Ibid*

³² UN Charter is strongly valid starting-point for this analysis because of its very wide acceptance by the states, its constitutional character, forming a basis for the organisation uniting all of the countries in the world. Thus, as argued in in Shelton, D., 2006, besides some of the human rights norms, also such rules as the prohibition of the use of force and the obligation to settle disputes peacefully deriving from the Charter could be considered *jus cogens* norms as norms “deemed basic for the international community” (p 304). Thus, the supremacy clause of the United Nations Charter set forth in Article 103, “has been taken to suggest that the aims and purposes of the United Nations - maintenance of peace and security, and promotion and protection of human rights - constitute an international public order to which other treaty regimes and the international organizations giving effect to them must conform.” (p 293, footnote 11). Erica de Wet in her article about international constitutional order (to be referred below) proposes namely UN Charter as the constitution for this order.

determination of peoples” and “encouraging respect for human rights and for fundamental freedoms”³³ The interconnectedness of these notions is well presented in an article authored by Erica De Wet, where, referring to several other authors, she concludes that despite a limited number of norms have achieved *jus cogens* status, most of them are human rights norms and that “UN Charter’s normative framework [...] has been the catalyst for the development of a legal order based on hierarchically superior values, as opposed to one exclusively based on the ‘equilibrium or value of sovereigns’.”³⁴

Third, from the practical point of view, I stick to the notion of the priority of clearly established norms in positive law (with the assumption that when contravening *jus cogens* norms/*erga omnes* obligations the norm will be void *a priori*). Customary law (although equally authoritative) comes in when there is no norm established in treaties.³⁵ The role of general principles of international law (and standards and values contained in them) is to give a guiding light when there is no suitable norm, there is a conflict between equal level norms or for the interpretation of the norm.³⁶ Being ‘recognised by civilised nations’ those principles form such a common value-network of international legal system that gives a surrounding or background according to which all the concrete norms need to be applied and interpreted. This approach reflects the idea of Martti Koskenniemi about “the three modes of juristic discourse, distinguished from the more concrete towards the more abstract as the modes of control, exegesis and philosophy.”³⁷

Forth, as discussed by Dinah Shelton (cited above), the notion of ‘soft law’ is not clearly defined and its legal value is not determined, however some points of application can be made: ‘soft law’ often precedes or accompanies ‘hard law’ (e.g. The Universal Declaration of Human Rights (1948) preceded the two covenants of human rights of the UN (1966)), some ‘soft law’ provides an authoritative interpretation of ‘hard law’ (e.g. General Comments of different bodies of the UN), and, very importantly, “compliance with nonbinding norms can

³³ UN General Assembly, *Charter of the United Nations*, San Francisco, 26 June 1945, art 1 <https://www.un.org/en/documents/charter> [accessed 20/03/2014]

³⁴ De Wet, E., “The International Constitutional Order”, *International and Comparative Law Quarterly*, Vol. 55, 2006, pp 51-76, p 59

³⁵ That does not mean that norms of customary law should be considered possessing less legal force, turning to unwritten law on only when there is no equivalent in a written law is simply more convenient from the practical point of view. Thus, very many customary law norms are codified in treaties, conventions etc.

³⁶ E.g. ICJ *North Sea Continental Shelf cases*, 20/02/1969, Summary of the Judgement, available at: <http://www.icj-cij.org/docket/index.php?sum=295&p1=3&p2=3&k=cc&case=51&p3=0> [accessed 20/03/2014] “There was no question of the Court's decision being *ex aequo et bono*. It was precisely a rule of law that called for the application of equitable principles, and in such cases as the present ones the equidistance method could unquestionably lead to inequity.”

³⁷ Koskenniemi, M., “Hierarchy in International Law: A Sketch”, *European Journal of International Law*, Vol. 8, 1997, pp 566-582, p 568-570, the three modes are interconnected and “normally set themselves again in hierarchical relationships” depending from the perspective and situation.

lead to the formation of customary international law”, furthermore it can provide “the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom” and “assist[...] in establishing the content of the norm.”³⁸ Thus, “the process of drafting and voting for nonbinding normative instruments may also be considered a form of state practice.”³⁹

And fifth, court decisions, as laid out in the ICJ Statute, constitute a subsidiary source of international law that can be used as an authoritative interpretation of norms and principles or a practice determining the status of a norm or principle as a part of (customary) international law or a general principle of international law. These functions of court decisions are relevant and necessary when the primary sources of law are either ambivalent or there is no clear regulation on some issue in law, i.e. the court decision might indicate a ‘hole’ in written law.

To sum up, the role of international law is to provide stability and control in international relations, therefore the principle *pacta sunt servanda* is one of the underlying principles of international law. That does not mean, however, that any agreement is permissible or any norm, once established, is valid forever, no matter what the consequences. In other words, legal positivism should be valued in international law, denouncing some norms or introducing new norms and principles must be rather conservative and rare, otherwise the law would lose its normative value and authority. At the same time it should borne in mind that the law is not ‘carved into stone’, it should reflect the reality in which it operates and serve the ‘common good of humanity.’ Otherwise there is no need for the law. In words of Martti Koskenniemi: “The law is for stability but equally for change, and which of its contradictory aspects is stressed cannot be determined from within the law itself.”⁴⁰ He concludes:

“Were the law merely an application of past hierarchies to present events it would undermine the individuality of cases and impose homogeneity over difference, enshrining a bureaucratic culture of blind obedience. That there is no closure to the reversal of hierarchies is a liberating experience; and just possibly the only way in which law can be an art of the just.”⁴¹

So, the fact that the right to truth is not explicitly established in international treaties does not necessarily mean that this right is non-existent. Below I try to shed some light on whether and how could the right to truth be seen through the lenses of international human rights law.

³⁸ Shelton, D., 2006, pp 319-322

³⁹ *Ibid*

⁴⁰ Koskenniemi, M., 1997, p 577

⁴¹ *Idem*, p 582, referring to Derrida, J., “Force of Law: The “Mystical Foundation of Authority”, in Carlson, D., Cornell, D. and Rosenfeld, M. (eds.), “Deconstruction and the Possibility of Justice”, 1992, pp 27-29 (footnote 47)

1.1. The Right to Truth as an Autonomous Right

1.1.1. The Right to Truth as a Norm of Customary International Law

According to the Statute of the International Court of Justice (hereinafter *ICJ*) international custom is an “evidence of a general practice accepted as law”⁴² (*opinio iuris*). In the context of human rights norms, Theodor Meron has proposed possible indicators for evaluating the customary law status of a norm in the context of international human rights law: “first, the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws.”⁴³

The right to truth as an autonomous right of an individual arose in the context of humanitarian crises and has been carried by the idea of seeking for justice, especially in the periods of transition. Article 32 of the Additional Protocol I (1977) to the Geneva Conventions of 1949 foresees *expressis verbis* the right of families to know the fate of their relatives.⁴⁴ The same is enacted in article 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance:

“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”⁴⁵

The European Court of Human Rights has repeatedly recognized that a government’s failure to provide information concerning victims of enforced disappearance can even amount to a breach of article 2 of the European Convention on Human Rights, the right to life;⁴⁶ article 3,

⁴² United Nations, *Statute of the International Court of Justice*, 18 April 1946, art. 38 (1) (b), available at: <http://www.refworld.org/docid/3deb4b9c0.html> [accessed 20/03/2014]

⁴³ Meron, T., “Human Rights and Humanitarian Law as Customary Law”, Clarendon Press, Oxford, 1989, p. 93, reference in Naqvi, Y., “The right to the truth in international law: fact or fiction?”, *International Review of the Red Cross*, Vol. 88, 2006, pp 245-273, p 254

⁴⁴ *Additional Protocol I of the Geneva Conventions* of 12 August 1949, 8 June 1977, art 32, available at: <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument> [accessed 14/03/2014]

⁴⁵ UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, art 24 (2), available at: <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx> [accessed 14/03/2014], the Convention is ratified by 42 and signed by 93 states.

⁴⁶ See e.g. *Cyprus v. Turkey*, 10/05/2001, 25781/94, para. 136, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454> “Having regard to the above considerations, the Court concludes that there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances.”

the right not to be subjected to torture or any form of degrading or inhuman treatment⁴⁷, a breach of the right to effective remedy and right to investigation⁴⁸, a right to family life⁴⁹. The African Commission on Human and Peoples' Rights' Principles and Guidelines on The Right of a Fair Trial and Legal Assistance in Africa implicitly recognises the right to truth as part of the right to effective remedy.⁵⁰ The Inter-American Commission of Human Rights has expressed the same opinion in one of its landmark decisions, *Velasquez Rodriguez*:

“The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.”⁵¹

Taking into account the consensual condemnation of enforced disappearances as a crime against humanity,⁵² the fact that almost all states have ratified the Additional Protocol I to the Geneva Conventions (173 ratifications and 3 signatures), and numerous resolutions, reports and studies on the right to truth by different UN bodies and courts confirming the same right⁵³, it might be said that the right to truth in the context of enforced disappearances and

⁴⁷ See e.g. *Tas v. Turkey*, 14/11/2000, 24396/94, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58976> “Having regard to the indifference and callousness of the authorities to the applicant’s concerns and the acute anguish and uncertainty which he has suffered as a result and continues to suffer, the Court finds that the applicant may claim to be a victim of the authorities’ conduct, to an extent which discloses a breach of Article 3 of the Convention.”

⁴⁸ See e.g. 25/05/1998, *Kurt v. Turkey*, 24276/94, para. 140, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58198> “In the view of the Court, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.”

⁴⁹ Decision on Admissibility and Merits, “*Srebrenica Cases*”, 7/03/2003, CH/01/8365 et al., para. 220 (4); see also para. 191, reference in Naqvi, Y., 2006, p 264

⁵⁰ “The right to an effective remedy includes: [...] access to the factual information concerning the violations.” And further “The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.” African Commission of Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted 24/10/2011, <http://www.achpr.org/instruments/fair-trial/>

⁵¹ IACHR, *Velásquez-Rodríguez v. Honduras*, 29/07/1988, 7920, para 181, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf One of the recent examples of the court upholding that decision is e.g. *Guerrilha do Araguaia* case where the court restated the obligation of the state to conduct investigation on disappearances, torture and murder, declaring the Brazilian 1970 amnesty laws illegal as inhibiting the fulfilment of these obligations. See IACHR, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, 24/11/2010, e.g. para. 171 available at: http://corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf

⁵² UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998, art 7 (1) (i), available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 15/02/14]

⁵³ To name some: OHCHR, *Study on the right to the truth*, Report E/CN.4/2006/91; UN Commission on Human Rights, *Principles of Impunity*, E/CN.4/2005/102/Add.1; *General Comment on the right to the truth in relation to enforced disappearance* in UN General Assembly, A/HRC/16/48, pp 12-17; Human Rights Commission/Human Rights Council resolutions 2005/66; 9/11; 12/12; decision 2/105; IACHR, *Velasquez Rodriguez* case; EctHR

other grave human rights violations has become a part of customary international law. Concerning the consequences of the crimes against humanity the right to truth operates as an empowerment and protection mechanism of the victims of such crimes. It is more complicated to draw the same conclusion in other areas relevant for human rights protection.

The creation of truth commissions (e.g. in El Salvador 1992, in Germany 1992, in various countries in Latin-America etc.⁵⁴) and special tribunals in an after-conflict settlement (like the ones for Rwanda⁵⁵ or Yugoslavia⁵⁶) shows the importance of dealing with the past and especially crimes against humanity in a process of reconciliation. “Generally, legal acts establishing truth commissions ground themselves in the need of the victims, their relatives and the *general society* to know the truth about what has taken place; to facilitate the reconciliation process; to contribute to the fight against impunity; and to reinstall or to strengthen democracy and the rule of law.”⁵⁷ [emphasis added, *M.R.*]

Some non-governmental organisations such as the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance have also made declarations “attesting to the importance of teaching about the facts and truth of the history, with a view to achieving a comprehensive and objective cognizance of the tragedies of the past.”⁵⁸ The Study on the Right to Truth is, according to its title, placed in a wider context of ‘protection and promotion of human rights’. The cited parts refer to a wider circle of subjects than just the direct victims of the crimes against humanity or war crimes, mentioning *inter alia* the right to know the truth of the ‘*general society*’. The same can be found in the preamble of the General Comment on the Right to Truth in relation to enforced disappearance:

“The right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society as a “vital safeguard against the recurrence of violations.”⁵⁹

Cyprus v. Turkey, African Commission on Human Rights Communications in *Amnesty International v. Sudan* case (references in Naqvi, Y., 2006)

⁵⁴ See a list of different truth, reconciliation and inquiry commissions on the homepage of Amnesty International: <http://www.amnesty.org/en/international-justice/issues/truth-commissions> [accessed 2/04/2014]

⁵⁵ UN Security Council, *Security Council Resolution S/RES/955 (1994)*, 8 November 1994, S/RES/955 (1994), available at: <http://www.refworld.org/docid/3b00f2742c.html> [accessed 14 March 2014]

⁵⁶ UN Security Council, *Resolution 808 (1993) Adopted by the Security Council at its 3175th meeting, on 22 February 1993*, 22 February 1993, S/RES/808 (1993), available at: <http://www.refworld.org/docid/3b00f15d30.html>, [accessed 14 March 2014]

⁵⁷ OHCHR, *Promotion and Protection of Human Rights. Study on the Right to the Truth*, Report E/CN.4/2006/91, 8 February 2006, available at: <http://daccess-ods.un.org/TMP/7768495.67890167.html> [accessed 20/03/2014] (hereinafter *Study on the Right to Truth*)

⁵⁸ *Ibid*

⁵⁹ UN General Assembly, *General Comment on the right to the truth in relation to enforced disappearance, Report of the Working Group on Enforced or Involuntary Disappearances*, 26 January 2011, A/HRC/16/48, pp

Declaring the importance of the teaching of history in a way that it would create ‘a comprehensive and objective cognizance of the tragedies of the past’ namely by an organisation fighting against racism, xenophobia and intolerance related thereto vividly shows how revealing of truth about the past relates to other human rights and influences the present and the future. A UN Independent Expert on Minority Issues (then Gay MacDougall) in her annual report of 2010 pointed out that “over 55 per cent of violent conflicts of a significant intensity between 2007 and 2009 had violations of minority rights or tensions between communities at their core” and drew the conclusion that “attention to minority issues and minority rights violations at an early stage – before they lead to tensions and violence – would make an invaluable contribution to the culture of prevention within the United Nations, save countless lives and promote stability and development.”⁶⁰

These observations well illustrate the ‘duty to remember’, resembling also in the pedagogic-messianist character of the criminal trials on crimes against humanity or comparable atrocities (discussed below) the landmark of which could be considered Nuremberg tribunals. In words of René Rémond:

“The formation of these tribunals is built on the assumption that all political acts have a moral dimension, and attests to the emergence of the idea of the collective responsibility of humankind on a global scale. It is accompanied by another radical shift, which also affects our relationship to the past: the idea that *some actions have no statute of limitations*.”⁶¹ [emphasis added, M.R.]

As mentioned above, the right to truth has mainly been handled in the context of transitional justice or post-conflict peace-building. The main aim of revealing the truth in that phase is to prevent an escalation of a new violence – according to Tristan Anne Borer, that could be called a ‘negative’ task of a ‘post-accord’ or ‘post-agreement’ (that is a phase after the formal ending of war) peace-building activity.⁶² At the same time there is a ‘positive’ task to remove the underlying causes of the conflict: “the dual challenge for peace builders in the period following an agreement includes preventing a relapse into war while simultaneously

12-17, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/104/45/PDF/G1110445.pdf?OpenElement> [accessed 20/03/2014] (hereinafter General Comment on the Right to Truth)

⁶⁰ OHCHR, News and Events, “Early attention to minority rights a key tool for stability and conflict prevention – states UN expert”, New York, 20/10/2010, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10472&LangID=E> [accessed 20/03/2014]

⁶¹ Rémond, R., “History and the Law”, Études no. 4046, 2006, available at: http://www.lph-asso.fr/index.php?option=com_content&view=article&id=154&Itemid=184%27E8=en [accessed 12/04/2014]

⁶² Borer, T. A. “Truth Telling as a Peace Building Activity: A Theoretical Overview”, in Borer, T. A. (editor) “Telling the Truths: Truth telling and Peace Building in Post-Conflict Societies”, Notre Dame 2006, University of Notre Dame Press, 316 p, pp 5-6

constructing a self-sustaining peace.”⁶³ It is clear that at least for sustainable, lasting peace the truth needs to be revealed in the society as a whole, not only among direct victims: the right to know the truth is, as declared in the above-referred UN study, possessed by the ‘general society.’⁶⁴ The literature on transitional justice confirms the same conclusion, e.g. Borer argues that: “Truth is not only the basic condition for overcoming the past but also the basic condition for developing a nonviolent perspective for the future.”⁶⁵

From the point of reconciliation specifically it has been rightly argued by Juan Mendez:

“In the first place, true reconciliation cannot be imposed by decree; it has to be built *in the hearts and minds of all members of society through a process that recognizes every human being's worth and dignity*. Second, reconciliation requires knowledge of the facts. Forgiveness cannot be demanded (or even expected) unless the person who is asked to forgive *knows exactly* what it is that he or she is forgiving. [...]”⁶⁶ [emphasis added *M.R*]

The same conclusion finds explicit confirmation in the Addendum of the Report of the Principles of Impunity⁶⁷ that sets forth ‘the right to know’ composed of the following principles: “the inalienable right to the truth; the duty to preserve memory; the victims’ right to know; guarantees to give effect to the right to know”. Principle 2 of the Principles of Impunity reads as follows:

“Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”⁶⁸

⁶³ *Ibid*

⁶⁴ The same position has been taken by the Inter-American Commission of Human Rights: “Its view is that ensuring rights for the future requires a society to learn from the abuses of the past. For this reason, this right to know the truth entails both an individual right applying to the victim and family members and a general societal right.” Annual Report of the IACHR, 1985–1986, OEA/Ser.L/V/II.68, Doc. 8 rev 1, of 28 September 1986, p. 205; Annual Report of the Inter-American Court of Human Rights, 1987–1988, OEA/Ser.L/V/II. 74, Doc. 10 rev 1, of 16 September 1988, p. 359 in Naqvi, Y, 2006, p 257

⁶⁵ Borer, T. A., 2006, p 18

⁶⁶ Mendez, J. “Accountability for Past Abuses”, Human Rights Quarterly, Vol. 19 (2), 1997, pp 255-283

⁶⁷ UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, 8 February 2005, E/CN.4/2005/102/Add.1, available at: <http://www.refworld.org/docid/42d66e780.html> [accessed 15/03/2014] (hereinafter Principles of Impunity) “Several Latin American countries have taken these principles and guidelines into account when drawing up legislation on reparations. The Inter-American Court on Human Rights has referred several times to them. They also influenced the Rome Statute of the ICC, notably article 75 dealing with reparations.” International Council on Human Rights Policy, report *Human Rights Standards: Learning from Experience*, Versoix, Switzerland, 2006, available at: http://www.ichrp.org/files/reports/31/120b_report_en.pdf [accessed 26/03/2014]

⁶⁸ UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, 8 February 2005, E/CN.4/2005/102/Add.1, available at: <http://www.refworld.org/docid/42d66e780.html>, [accessed 14 March 2014]

As indicated above, the focus point of this research is the right to historical truth, the creation of historical narrative as a part of nation building process in peace-time. Is it now, when the truth commissions have done their job, just up to the state to decide how to present history or is that somehow still also a “legitimate concern of the international community”⁶⁹ as human rights are claimed to be? The opinions of transitional law (and other⁷⁰) scholars and examples mentioned above illustrate, if not *a priori* juridical applicability, then at least practical importance of the right to truth at any time in any society. Thus, it is not logical that the right to truth, arising from acts (crimes against humanity) without any ‘statute of limitation’ ends in a certain period of time, in practice that would mean a temporal restriction also on the acts themselves.

1.1.2. The Contours of the Right to Truth as a Norm of Customary International Law

Based on the development of the right to truth in international legal acts, court practice and national practice described above, a “two-track evolution”⁷¹ is noticeable, giving that the right to truth invokes in case of:

“(1) single violations of human rights that entail individual and case-specific remedies (i.e., for the victim or victim’s family), as reflected in the jurisprudence of human rights courts and monitoring bodies, and (2) mass violations of human rights that necessitate a broader inquiry into the reasons and causes for such violence (i.e., for society in general) as established by the practice of truth commissions or commissions of inquiry and in resolutions of the UN General Assembly and Security Council.”⁷²

Concluding that way, the right to truth rather applies in the direct aftermath of a conflict or remedying a violation of a human right. I claim that the right to truth not only has links and narrative importance also outside this restricted scope but also legal meaning and effect.

1.1.2.1. The Right to Truth and the Right to Information – Differences and Inter-Relations

The right to receive truthful and impartial information is one of the corner-stones of a democratic society. As put by Subash Kashyap, a leading authority of constitutional law and politics in India: “Information today equals power, and in a democracy power belongs to the

⁶⁹ Vienna Declaration art I 1 (5)

⁷⁰ See e.g. Charny, I., W., “The Psychological Satisfaction of Denials of the Holocaust or Other Genocides by Non-Extremists or Bigots, and Even by Known Scholars”, IDEA: A Journal on Social Issues, Vol. 6 (1), 17 July 2001, available at: <http://www.ideajournal.com/articles.php?id=27> [accessed 26/04/2014]; or Smith, R., W., Markusen, E., Lifton, R., J., “Professional Ethics and the Denial of Armenian Genocide”, Holocaust and Genocide Studies, Vol. 9 (1), Spring 1995, p 1-22

⁷¹ Naqvi, Y., 2006, p 260

⁷² *Ibid*

people.”⁷³ Indeed, the right to “seek, receive and impart information and ideas of all kinds”⁷⁴ is a prerequisite for enjoying other fundamental rights such as the freedom of expression, freedom of thought and conscience, the right to education, the right to a fair trial, the right to participate in democratic processes, the right to assembly etc. Taking into account the enormous and constantly growing amount of information, the very wide application of the freedom of expression, the importance of public debate and ability of anyone to share his thoughts and contest the ones of others, some rules and limits on this *agora* apply. Different rights might limit each-other, the public order and safety or other human rights might constitute a legitimate basis, ‘necessary in a democratic society’ to use terms of ECHR, for the restrictions of any of those rights.⁷⁵

In large number of cases the truth forms the centre of these rules – it is not imaginable that these rights could be enjoyed in a lack of information, say as a result of arbitrary prohibition of its emanation, by allowing deliberately false information or providing no mechanisms for people to protect themselves from the dissemination of wrongful information about them.⁷⁶ In that sense, the role of the right to truth could be seen as of the general principle of international law, comparable to the principle of *bona fide*, as will be discussed below.

On the norm level, however, it is necessary to make a distinction between the right to truth and the right to information. As put forth by Meron, for deciding whether a right could be considered as customary norm of international law one has to consider “the degree to which a particular right is subject to limitations (claw-back clauses) and the extent of contrary practice.”⁷⁷ The right to information as other rights mentioned above may be restricted, it is not an absolute right as for example the right not to be subjected to torture or any other form of degrading or inhuman treatment.⁷⁸ E.g. the famous case of Edward Snowden illustrates the tendency to limit the publishing of information, even if it contains important information about the breaches of fundamental rights (like the right to privacy, secrecy of correspondence

⁷³ Gangajee, D. S., Kallol, D, “Truth is Out There... A Critical Evaluation of the Right to Information”, Student Advocate, Vol. 9, 1997, pp 126-133, p 132

⁷⁴ UN General Assembly, *International Covenant of Civil and Political Rights*, 19 December 1966, art 19 (2) <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [accessed 21/04/2014]

⁷⁵ CoE, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, para. 2 of art. 8-11, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed 21/04/2014]

⁷⁶ See e.g. the cases of ECtHR in *Lingens vs Austria*, 6/07/1986, 9815/82, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57523>; *McVicar vs UK*, 7/05/2002, 46311/99, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60450>, where the court makes a distinction between value judgements and facts presentation, whereas the truthfulness of the former is not and that of the latter is provable. In *Dichand and Others vs Austria*, 26/02/2002, 29271/95, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60171> the court goes even further and argues that even value judgements demand some basis in fact.

⁷⁷ Naqvi, Y., 2006, p 265

⁷⁸ ECHR art. 3

etc.) using a justification of state security.⁷⁹ The right to truth, as discussed above, is related to the implementation of international criminal law, to the “serious violations of international humanitarian or human rights law”⁸⁰; the judgements of international and regional courts referred above have indicated that “a failure to inform people of the fate and whereabouts of missing relatives may amount to torture — clearly a *jus cogens* crime.”⁸¹ Very importantly, ECtHR, referring to several UN documents on the right to truth, in *El-Masri* case explicitly recognised the right to truth as deriving from article 3 of the ECHR⁸², holding that

“an unjustifiably broad interpretation of State secret privilege had been asserted by the US Government in proceedings before US courts in that case, and that the same approach had led the Macedonian authorities to hide the truth. In the context of the secret detention, rendition and torture programme of the Bush-era CIA, [...] the concept of State secrets “has often been invoked to obstruct the search for the truth.””⁸³

So the right to truth, although not explicitly enacted as a human right, is paradoxically, in contrast to the right to information which is, mainly in connection to the freedom of expression, enacted and widely approved as such, a stronger concept, forming a prerequisite for proper implementation of *jus cogens* norms. The customary norm of the right to truth should therefore not be equated with the right to information – the right to truth as a norm of customary character derives from different sources and applies in different context than the right to information. Taken the right to truth as a pre-requisite “to vindicate other essential rights, such as the right to life and the right not to be subjected to torture, it is difficult to justify limitations or derogations to its application.”⁸⁴ The Study on the Right to Truth states:

“The right to the truth as a stand-alone right is a fundamental right of the individual and therefore should not be subject to limitations. Giving its inalienable nature and its close relationship with other

⁷⁹ See a video-interview with Edward Snowden in Hong Kong, 6/06/2013, available at: <http://www.theguardian.com/world/video/2013/jul/08/edward-snowden-video-interview> [accessed 7/04/2014]; see also the cases of ‘whistle blowers’ of the ECtHR, e.g. *Guja vs Moldova*, 12/02/2008, 14277/04, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85016> or *Stoll vs Switzerland* 10/12/2007, 69698/01, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83870>. The court has established that in case of civil servants publishing information which they have gained in course of work duties two aspects have to be considered in the context of art. 10: the level of public interest (and whether it overrides the confidentiality); and the *authenticity* of the information disclosed.

⁸⁰ Naqvi, Y., 2006, p 265

⁸¹ *Ibid*

⁸² The right not be subjected to torture or any other form of inhuman or degrading treatment.

⁸³ ECtHR (Grand Chamber), *El-Masri vs. “The Former Yugoslav Republic of Macedonia”*, 13/12/2012, 39630/09, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>, concluded in UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 1 March 2013, A/HRC/22/52, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf [accessed 21/04/2014]

⁸⁴ *Ibid*

non-derogable rights, such as the right not to be subjected to torture and ill-treatment, the right to the truth should be treated as a non-derogable right.”⁸⁵

Nevertheless, there are also significant similarities. The distinction between the value judgements and facts presentation in the context of the freedom of expression and right to information and the concepts of forensic and narrative truth (discussed below) in the context of the right to truth are very similar in their character. In both cases the facts can be proven and controlled, while the value judgement or narrative cannot; in both cases established and proven facts set limits to the formulation of value judgements or narratives. Thus, the criterion of authenticity of the information in cases of ‘whistle-blowing’ clearly refers to the query of truthfulness of the information in question. So the right to information includes the right to truth in its own sphere of application. As the Study on the Right to Truth states, “the right to seek information may be an instrumental right to realize the right to the truth, but both constitute different and separate rights.”⁸⁶

Moreover, as for the judicial procedures or other legal mechanisms involving the application of the right to truth, the right to information could serve as a credible source of analogy and interpretation. As areas where the freedom of expression and information is particularly important, (such as journalism, court trials, book publishing etc.) are also among main grounds for the preservation, structuring and analysis of the past atrocities and shaping the memory, especially in difficult times when also the right to truth arouses, the concepts may intervene and even overlap, applying at the same time and moulding each-other. Hate speech could be an example of that (as is well exemplified by Holocaust denial cases discussed below).

However, the right to truth as an independent concept has developed and been invoked in a totally different context than the right to information – its roots and necessity lay in a *jure belli* or *post belli* or situations analogous or close to that, it operates as an initial guarantor of the human dignity and the humanity as such, pre-requisite for the implementation of *jus cogens* norms. The right to information definitely posits itself in the *jure paci*, protecting foremost rights guaranteeing the (political) participation in public life. So when talking about the historical knowledge of past atrocities, we are in the first place talking about the right to truth which for the named reasons *a priori* cannot be subjected to limitations such as those legitimately limiting the right to information. To bring an example from the peace time case law that could be considered upholding the right to truth, such rulings as those of Paul

⁸⁵ *Idem*, para. 60

⁸⁶ Study on the Right to Truth, 2006, para. 43

Touvier, Maurice Papon or Klaus Barbie in France could be named. In those cases the French courts invoked the article on the non-prescription of the crimes against humanity, the actual significance and aim of those processes was considered to be, together with the avoiding of impunity, to reveal and clarify *historical truth*.⁸⁷ As Leila Wexler observes in her study on the case of Touvier, it was “the trial of the whole French society and not just one man.”⁸⁸

As the last difference, the collective nature of the right to truth must be mentioned. While the right to information can be invoked by individuals who can prove to be in a status of a victim of a human rights violation and show that the violation is entirely or partly caused by the false propaganda, the right to truth has an appeal also as a collective right. In the period of transition, the truth commissions and other mechanisms dealing with the past are meant namely for the whole society, not only direct victims.⁸⁹

The French cases, however, show that, even if not explicitly mentioned, the right to truth invokes also in peace time society in cases concerning historical truth about past atrocities. Taken together with the more and more acknowledged ‘duty to remember’⁹⁰ it might be said that the right to truth cannot be limited to the period of transition.

1.1.2.2. The Rationae Temporis of the Right to Truth

The temporal application of the right to truth is very difficult to limit to a certain period in an aftermath of a conflict or some other event evoking it. That would not be too convenient from the practical point of view either as it presumes that one needs to wait for the outset of atrocities (or even some consequences) before anything could be claimed or done on a wider societal scale, which would not comply with the obligation of the prevention of such crimes or the obligation of the maintenance of peace and security deriving from the UN Charter.

Sometimes it is not even possible to reveal or find out all the relevant facts and circumstances of the tragedy in question in a soon aftermath of the events. Historical research takes time. The referred processes of the French Nazi collaborators vividly illustrate this situation. Some important parts of French history were lost in the post-war nation building process where

⁸⁷ Koskeniemi, M., “Between Impunity and Show Trials”, Max Planck Yearbook for United Nations Law, Vol. 6, 2002, pp 1-35, pp 22-32

⁸⁸ *Idem*, p 23, (footnotes 72-73 pp 22-23), referring to Wexler, L., S., “The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again”, Col. J. Transnat’l L. 32, 1994, p 287 et seq., (338), p 346

⁸⁹ See e.g. Hazan, P., “Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice”, International Review of the Red Cross, No. 861, 2006, pp 19-47 or Humphrey, M., “From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing”, The Australian Journal of Anthropology, Vol. 14, 2003, pp 171-187

⁹⁰ See e.g. in Principles of Impunity, principle 3

France attempted to distance itself from the circle of the perpetrators of the Nazi regime. That left the people who were victimised by French Nazi collaborators out of the nation building process in a new post-conflict society.⁹¹ Talking about the historiography and “historical representations” of the nations, John Torpey concludes that “states can no longer ignore the subterranean histories of the many groups submerged or oppressed in the nation building process.”⁹²

But there can also be, and often are, very practical reasons that make the proper fulfilling of the right to truth impossible in transitional period. Tina Rosenberg brings an example of the difference between Latin American and Communist transitions – the transition from “criminal regime” and “regime of criminals” respectively – and argues that it is easier to hold processes over collaborators when there is a small circle of responsables.⁹³ Thus, the fact that it “took years until the full extent of Jewish catastrophe was revealed to the victors” well illustrates that history, written on a trial in the close aftermath of the conflict faces the challenge of interpretation that will necessarily “be based on fragmentary evidence and influenced by interpretations by contemporaries with a concrete stake in the result.”⁹⁴

Moreover, Torpey points out the weaknesses deriving from the concept of the transitional justice as such undermining the proper dealing with the past and satisfying people’s rights connected to the right to truth: first, it pursues “foreshortened time horizons”, a “view that the past [...] begun only the day before yesterday,” and second, it pays “disproportionate attention to regime changes.”⁹⁵

“In contrast to the historical shallowness of the transitional justice paradigm, many of the historical injustices[,] [the] demands for repair of the subterranean past concern heinous regimes and actions that may stretch back hundreds of years or they may impugn political and social orders whose flaws for particular groups have only recently grown politically salient.”⁹⁶

As already discussed, it is not even clear when does the period of transition end. Thus, it is not reasonable to declare the right serving as a restorative mechanism of justice and peace not to apply in situations where manipulated or biased information creates or preserves the causes of the crisis. Furthermore, “it should also be borne in mind that those rights most crucial to

⁹¹ On that see e.g. Koskeniemi, M., 2002

⁹² Torpey, J., “Introduction: Politics and the Past”, in Torpey, J. (ed.), “Politics and the Past: On Repairing Historical Injustices”, Rowman & Littlefield, Oxford, 2003, pp 1-26, p 23

⁹³ Rosenberg, T., “The Haunted Land: Facing Europe’s Ghosts after Communism”, Random House, New York, 1995, pp 397-407, referred in Torpey, J., 2003, p 8

⁹⁴ Koskeniemi, M., 2002, p 22

⁹⁵ Torpey, J., 2003, p 8

⁹⁶ *Idem*, pp 8-9

the protection of human dignity and of universally accepted values of humanity require a lesser amount of confirmatory evidence of their customary character.”⁹⁷

So, there is a very reasonable basis to assume that the memory laws and politics, as peace-time measures dealing with the atrocious legacy of the past, come under the auspices of the right to truth.

1.2. The Right to Truth as a General Principle of International Law

We have an underlying assumption that the education provided in schools should be truthful, that media should provide impartial information, that judges should base their decisions on truthful facts etc. As stated above, the right to truth as a notion is ‘crucial to the protection of human dignity and of universally accepted values of humanity’. So, applying the terms of general legal theory, the right to truth may be too wide, encompassing too much to define it as a legal norm but is definitely way too important and widely accepted and applied to exclude from the international-legal domain. In other words, the right to truth has characteristics of a legal principle.⁹⁸

The opinions of scholars about the sources and the level of generalisation of the norms reaching the substance of a general principle of international law vary significantly. The starting-points of the approaches – similarly to the ones on *jus cogens* norms – range from strict positivist⁹⁹ to highly naturalist¹⁰⁰. However, “the majority of scholars believe that article 38 (I) (3) of the Statute of the PCIJ and article 38 (1) (c) of the ICJ Statute envision or imply that "General Principles" can be identified from two different legal sources - national and international.”¹⁰¹ The general principle of international law must be pursued as a “common

⁹⁷ Meron, T., 1989, pp 35 and 113, reference in Naqvi, Y., 2006, p 268.

⁹⁸ On the distinction of the norm or rule and principle see e.g. Dworkin, R., “Taking Rights seriously”, Cambridge, Harvard University Press, 1977, pp 22-31, reference in D’Amato, A., “What ‘Counts’ as Law?”, Faculty Working Papers, Paper 132, 1982, available at: <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/132> (also published in Onuf, N. G. (ed.), “Law-Making in the Global Community”, Carolina Academic Press, 1982, pp 83-107), pp 18-19: “A principle is entitled to a certain weight in the consideration of a decision, whereas a rule points to an unambiguous result. A rule either applies or it doesn't apply; if it applies, it is decisive. But a principle may apply and yet be overshadowed by other principles.” In international law, the author explains, the “principles do not decide specific cases but they are factors in the decisions.”

⁹⁹ The most prominent example of legal positivism could maybe considered to be Hans Kelsen’s “Pure Theory of Law” the main idea of which is that the validity of legal norms derives from the legal system itself not from some higher or simply other values or principles from above or outside. See e.g. in Koskenniemi, M., 1997, pp 566-567

¹⁰⁰ Represented among others by such authors as Aristotle, St. Thomas, Pufendorf and Grotius the idea of natural law sees the law as a mean for gaining higher purposes not an end in itself and therefore the validity of legal norms derives from their efficiency in attaining those purposes and compliance with the higher values or virtues guiding these purposes. See e.g. in D’Amato, A., 1982, p 7

¹⁰¹ Bassiouni, A. and Cherif, M., “Functional Approach to General Principles of International Law”, Michigan Journal of International Law, Vol. 11, 1989-1990, pp 768-818, p 772

denominator” that “exists between all legal systems”.¹⁰² In words of Baron Descamps, the president of the Advisory Committee which drafted the Statute of the PCIJ:

“The fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations [exists in every legal system].”¹⁰³

A little less emotional definition which could serve well here is given by Sir Hersch Lauterpacht:

“[T]hose principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character... a comparison, generalization and synthesis of rules of law in its various branches – private and public, constitutional, administrative, and procedural – common to various systems of national law.”¹⁰⁴

Taking into account the strong interrelation and resemblance of the right to truth with other human rights, the rule of law and democracy, the application of it by courts and other international investigative bodies, declaration in numerous international documents, acceptance by national legal systems and its derivation from the notion of ‘human dignity and of universally accepted values of humanity’, the right to truth could be examined as a general principle of international law, compared to such principles as good faith or proportionality which are “borrowed from national systems and are based on “natural justice.””¹⁰⁵

As mentioned above, differently from those principles, the right to truth has not found explicit mentioning in any human rights documents qualifying as ‘hard law’ (with an exception of the Enforced Disappearances Convention, supported by Additional protocol I of the Geneva Conventions), “but rather in authoritative interpretations of otherwise binding norms.”¹⁰⁶ Therefore, as Mendez argues, the right to truth could be considered an “emerging principle”.¹⁰⁷ He discusses the right to truth and its connections with binding human rights and international criminal law instruments, pointing out that the acts constituting crimes

¹⁰² *Ibid*

¹⁰³ *Idem*, p 773

¹⁰⁴ *Idem*, p 770

¹⁰⁵ Naqvi, Y., 2006, p 268

¹⁰⁶ Mendez, J., “The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth Telling” in Borer, T. A. (ed), “Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies”, University of Notre Dame Press, 2006, pp 115–150, p 116. See also Mendez, J., 1997: “These rights and obligations result primarily from the recent expansion of existing norms through the creation of law, particularly international law in the form of nonbinding resolutions, judicial and quasi-judicial precedent, the practice of nations, and *opinio juris*.”

¹⁰⁷ *Ibid*

against humanity infringe such “core norms” of international law that “cannot be suspended even in the event of an emergency that threatens the life of the nation or its national security. Immunity for these crimes constitutes an impermissible *ex post facto* derogation of rights which could not have been suspended at the time the acts were committed.”¹⁰⁸

He argues that many such binding norms as those in e.g. Genocide or Torture conventions or customary norms “point in the direction of an obligation to overcome impunity for crimes of this kind” and “rule on the inapplicability of statutes of limitations to crimes against humanity [...]”¹⁰⁹ The unequivocal agreement that states are obliged to punish the perpetrators of such acts brings along the emergence of a set of new principles, expansion of “universally applicable norms,” deriving from the more concrete tasks arising from this obligation. These tasks include the obligation “to disclose to the victims, their families, and society all that can be reliably established about those events” which corresponds to “*a right to know the truth of an “individual and collective persons.*”¹¹⁰[italics added, M.R.]

Koskenniemi argues that the fate of international law “as a carrier of [...] the regulative idea of universal community, independent of particular interests or desires” is “not a matter of re-employing a limited number of professionals for more cost-effective tasks but of re-establishing hope for the human species.”¹¹¹ In coherence with that idea it is argued that human rights are fulfilling a role of being “a gentle civiliser of social systems.”¹¹² The role of the right to truth as described in this thesis highly coincides with this notion. Therefore I argue that the right to truth could actually be considered not ‘emerging’ anymore but as an already established principle of international human rights law. This conclusion is also supported by the nature and system of international law and law in general which I will now briefly discuss.

An obligation of a lawyer to tell the truth and the role of truth in legal system has been a topic of a widespread debate. The fact that truth or reliable evidence in courtroom does not always coincide with the truth in ‘real life’ has often caused frustration and lead to accusations towards lawyers being immoral liars and the sphere of law far from reality and justice. It has

¹⁰⁸ Mendez, J., 1997

¹⁰⁹ *Ibid*

¹¹⁰ *Ibid*

¹¹¹ Koskenniemi, M., “The Fate of International Law: Between Technique and Politics”, *Modern Law Review*, Vol 70, 2007, p 3

¹¹² See e.g. Fischer-Lescano, A., Teubner, G., “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law”, *Michigan Journal of International Law*, Vol 25, 2004, pp 999-1046, referring to Koskenniemi, M. and Leino, P., “Fragmentation of International Law? Postmodern Anxieties”, *Leiden Journal of International Law*, Vol. 15, 2002, p 553

been proposed to derive from the fact that different theories of truth are applied in social and legal spheres of life: correspondence theory and coherence theory respectively.¹¹³

In short, there are certain traits and principles in legal realm that essentially modify the perception of facts, truthfulness and decision making process compared to everyday life. “In contrast to the coherence theory of truth is the correspondence theory, resulting from the belief that statements are true by virtue of their correspondence to states of affairs in the world.”¹¹⁴ An intellectual property and commercial disputes lawyer Eric Bjorgum argues that the need for a different conception of truth in legal system lays in uncertainty: “It is almost a given that the fact finder will never know the truth, in the correspondent sense: unless the act at issue occurs in the court room. [...] the legal system functions on the coherent model of truth primarily because of uncertainty. [...]”¹¹⁵ This is why we need “procedural safeguards or values” potentially contradicting the correspondent truth.¹¹⁶

So, the coherence-conception is not a different virtue but a tool to meet practical needs. Drawing an analogy with above-referred Mendez’s argumentation about the relationship between truth and justice, it might be said that like the truth does not replace justice as a means of avoiding due judicial procedure, so does the legal coherence conception not replace or remove the actual underlying purpose of every judicial proceeding – to reveal the truth. Thus, as Bjorgum proves, the truth has an “inherent value” in legal system as such, i.e. the system cannot function without some requirement of truth. The value of truth is not only “instrumental” because in that case “we must accept that lack of truth, or lying, could be just as good instrumentally (depending on the circumstance),” but this is something we cannot accept as “lying is logically and empirically flawed. Thus, the original premise was wrong, and therefore its opposite must be true – truth is at least its own inherent good,”¹¹⁷ constituting an ‘obvious maxim of jurisprudence of a general and fundamental character.’

In short, the assumption that the right to truth operates as a general underlying principle basis itself already in the very characterisation of the system of the law but is also reasonably arguable under the concept and theory about general principles of international law. In regard of the historical truth and information about past atrocities, “[t]he right to truth as an emerging principle of international human rights law shapes states’ duties in relation to dealing with the

¹¹³ Bjorgum, A. E., “Pursuing Truth in the Adversary System: An Ideal Criterion”, *Georgetown Journal of Legal Ethics*, Vol 9, 1995-1996, pp 1211-1220

¹¹⁴ *Ibid*

¹¹⁵ *Idem*, p 1215

¹¹⁶ *Ibid*

¹¹⁷ *Idem*, p 1213

past.”¹¹⁸ Mendez sees the emerging principle of the right to truth in human rights law applying “to human rights crimes particularly severe of nature, such as extrajudicial executions, disappearances, and torture, when they take place as part of a deliberate, systematic, or widespread pattern[,] [...] acquire[ing] the status of crimes against humanity.”¹¹⁹

The crimes against humanity do not expire. As stated in article 29 of the Rome Statute, “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”¹²⁰ As argued above, the same is confirmed about investigation and punishment of such crimes in many other international-legal documents and the obligation to reveal the truth giving rise to the right to truth has therefore established itself as a ‘norm of universal applicability’. So, if the crimes against humanity do not expire, does logically not expire the right to truth about them either. That would constitute an ‘*ex post facto* derogation of rights which could not have been suspended at the time the acts were committed.’

Therefore, in coherence with the described role and nature of truth in the sphere of law, and the role of international law and human rights law in particular (to be a ‘gentle civilizer’), it can be argued that the right to truth in peace-time applies as a general principle of international law. It is appropriate to conclude with a very apposite quote from Eric Bjorgum:

“Truth occupies a central position in the values of our coherent legal system along with equality, fairness, consistency and justice, however defined. But truth is actually the value that is most at work in the system. Once conceptions of the other values are in place, we need to go about the everyday task of trying to find out what actually happened, and this is a discussion of truth.”¹²¹

I further analyse, what could be considered the core content of the right to truth.

¹¹⁸ “The same must be said about the duty to investigate and to prosecute perpetrators of gross human rights violations.” See Mendez, J., “The Human Right to Truth: Lessons Learned from Latin American Experiences with Truth Telling” in Borer, T. A. (ed), “Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies”, University of Notre Dame Press, 2006, pp 115–150, p 119

¹¹⁹ *Idem*, p 116

¹²⁰ Rome Statute, art 29

¹²¹ Bjorgum, E., 1995-1996, p 1215

1.3. The Content of the Notion of Truth

“The truth is rarely pure and never simple.”
Oscar Wilde, *The Importance of Being Earnest* (1895)

In large, there are two main approaches to the notion of truth: correspondent and relativist.¹²² The first derives from an assumption that truth or truthfulness objectively exists,¹²³ second takes the standpoint that truth only derives from subjective traits and interests of the evaluator and varies depending on the situation and moment.¹²⁴

This raises the question of the difference between a belief and truth. Michel Foucault has dedicated lots of his research on finding out, why and how do beliefs change, the question for Foucault is the inner dynamics, the power and authority relations in the scientific system itself.¹²⁵ “The state authority is simultaneously individualising and totalising form of authority,”¹²⁶ he claims. He argues that the modern Western state has integrated into its new political form an old Christian institutions’ power-technique, which he calls “pastoral power” – a form of authority, directed to “salvation”, being “sacrificing (as opposite to the principle of sovereignty); individualising (as opposite to legal power), far-reaching and long-lasting as life; it is connected to the production of the truth – *individual’s own truth*”¹²⁷ [emphasis added, *M.R.*]

Nowadays, Foucault argues, the heavenly salvation has been replaced with the guaranteeing of that on the Earth. “In this context the word “salvation” obtains many different meanings: health, welfare (sufficient wealth, living-standard), safety, protection from an accident.”¹²⁸ The pastoral authority – that had for centuries been connected to one religious institution – has spread “in the whole social body,”¹²⁹ so for “the actual and effective implementation of

¹²² Naqvi, Y., 2006, pp 249-254, Bjorgum, a. E., 1995-1996, pp 1214-1215 (coherence and correspondence for him)

¹²³ See e.g. the metaphysical definition as presented by Thomas Aquinas claiming that a “judgment needs to be involved in ascertaining the truth, but a judgment is only said to be true when “it conforms to the external reality.”” Or Aristotle’s definition: “To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.” Naqvi, Y., 2006, p 250

¹²⁴ See e.g. Benedetto Croce who suggested history is “exploring the historical truth of the past out of a present interest.” Or as Walt Whitman’s observes, “[w]hatever satisfies the soul is truth.”” *Idem*, p 251

¹²⁵ Foucault, M., „Tõde ja võim“ (“Truth and Power”), in Tamm, M. (ed.), „Teadmine, võim, subjekt. Valik räägitust ja kirjutust“ (“Knowledge, Power, Subject. Selection of Spoken and Written”), translated by Pakk, T., Varrak, Tallinn, 2011, pp 228-262

¹²⁶ Foucault, M., „Subjekt ja võim“ (“Subject and Power”), in Tamm, M., 2011, pp 277-309, p 286 [hereinafter my translations from Estonian]

¹²⁷ *Ibid*

¹²⁸ *Ibid*

¹²⁹ *Idem*, p 290

power” it has become necessary for the authority “to become able to find access to the bodies, deeds, attitudes and ways of everyday behaviour of individuals.”¹³⁰

This train of thought well reflects the central question of this research: how far can a state go in producing ‘individual truth’, i.e. shaping or influencing person’s identity? Is any presentation or handling of historical facts justified to build a strong national identity, to ‘make people feel good’? How does the right to truth as a general principle or customary norm of international human rights law change or influence the picture?

Hannah Arendt has argued that “the surest long-term result of brainwashing is a peculiar kind of cynicism – an absolute refusal to believe in the truth of anything, no matter how well this truth may be established.”¹³¹ Contrary to the whole post-modernist predominantly or entirely relativist way of thinking, factual truth in its “stubborn thereness”¹³² is an *absolute truth* “whose validity needs no support from the side of opinion.”¹³³ In that way facts have coercive force over opinions, “persuasion or dissuasion is useless” – quoting Grotius, “even God cannot cause two times two not to make four.”¹³⁴

Arendt, similarly to Foucault’s metaphor of ‘salvation’, concludes that the sphere of politics initially derives from the need “to take care of life’s necessities,” the ability not to take everything as it is (i.e. as is the truth) gives us the capacity to improve, to change the world.¹³⁵ In that sense politics in its attitude toward facts must “tread the very narrow path between the danger of taking them as the results of some necessary development which men could not prevent” or do anything about it “and the danger of denying them, of trying to manipulate them out of the world.”¹³⁶ The balancing and protection of the truth in politics has to come from outside the political sphere and namely for that reason has the governing principle or “the highest criterion of speech and endeavour” of such fields as law and higher education always been, “contrary to all political rules, truth and truthfulness.”¹³⁷

As will be further shown, the protection of the factual truth being manipulated out of the world is the core substance of the right to truth.

¹³⁰ Foucault, M., “Truth and Power”, in Tamm, M., 2011, p 250

¹³¹ Arendt, H., “Truth and Politics”, in Arendt, H., “Between Past and Future”, Penguin Books, New York, 1977, reissued 1993, pp 227-264, p 257

¹³² *Ibid*

¹³³ *Idem*, p 233

¹³⁴ *Idem*, p 240

¹³⁵ Arendt, H., 1993, p 259

¹³⁶ *Ibid*

¹³⁷ *Idem*, p 260

1.4. Conclusion

The right to truth in the direct conflict-aftermath could be considered:

- a) an autonomous right to know the fate of one's relatives in case of forced disappearances in humanitarian law (art 32 of the Additional Protocol I to the Geneva Conventions of 1949) and human rights law (The International Convention for the Protection of All Persons from Enforced Disappearance art. 24 (2));
- b) a norm of customary international law constituting a right to know the truth of the 'general society' when crimes against humanity or other grave human rights violations have taken place in society – i.e. the right to historical truth;
- c) a norm of customary international law constituting a right to know of an individual who has become a victim (including heirs) of human rights violation(s) (not limited to the events of enforced disappearances only).

There is a slightly grey area about the status and applicability of the right to truth in 'normal' times. Although extremely important prerequisite and indicator of democracy and rule of law, application of *jus cogens* norms, 'crucial to the protection of human dignity and of universally accepted values of humanity', the status of the right to truth as a norm of customary international law in peace-time society without a situation of enforced disappearance or any comparable human rights violation, is still debatable because of not directly fulfilling the criteria of the Statute of ICJ: being grounded in general practice and *opinio juris*. Or, to use Meron's yardsticks for human rights law named above: in that way it has not been established (or repeated) in any human rights treaty or other act, nor has it been largely adopted by states into their domestic law or confirmed by courts' practice.¹³⁸

That, however, concerns the explicit dealing with the 'right to truth'. If one would consider the establishment in general practice and *opinio juris* through a teleological interpretation, relieving the criterion from the *expressis verbis* mentioning to contextual or implicit one, there would be far less doubt that the right to truth attains the threshold of a customary norm

¹³⁸ There are several arguments for that conclusion, e.g. the "extraordinary rendition" cases, see e.g. Priest, D., "Wrongful Imprisonment: Anatomy of a CIA Mistake", The Washington Post, 4/12/2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html> [accessed 15/03/2014]. But also amnesty which actually puts even the transition-time right to truth under question, confirming the fact that the right to truth exists as a measure to achieve peace and reconciliation, not an end in itself and is "relative to present needs". See Naqvi, Y., 2006, pp 262-263. See also Mendez, J. "Accountability for past abuses", Human Rights Quarterly, Vol. 19 (2), 1997, pp 255-283, where Juan Mendez who has called the right to truth "an emerging principle of international law" contends the *a priori* supremacy of the truth, emphasising the need for justice and different circumstances of every transition. The main point he makes is that truth has a value in its own but it cannot substitute justice, i.e. a truth report cannot substitute due judicial processes over the people guilty of violations of human rights.

of international law also in peace-time. Based on the brought examples, I conclude that if human rights are considered a ‘legitimate concern of the international community’, so should be the right to truth, not only as an independent right but, more relevantly for the purposes of this research, as an inevitable part and a prerequisite for effective implementation of other human rights. In that way the right to truth in peace-time functions as a general principle of international human rights law.

2. The Right to Historical Truth

“Historians owe historical truth not only to the living but to the dead.”¹³⁹

In this chapter I will analyse whether and how this poignant phrase resonates in the human rights law and the right to truth. The shortcomings of the transitional justice described above and the ‘belated trials’ over old men and women for the crimes committed half a century ago, let alone reparation claims for slavery (also triggering the need to deal with historical facts) that took place more than a century ago, strikingly show that it does.

It is widely agreed that the preservation of the memory of past tragedies is necessary in order to avoid recurrence of such events in the future and to respect the dignity and memory of victims, survivors and their heirs. The so called ‘duty to remember’ articulated after the World War II has obtained new connotations and expressions, the past belongs to the present and determines the future.¹⁴⁰ The full title of the Genocide Convention reads: The Convention on the *Prevention and Punishment of The Crime of Genocide*. Article 1 of the Convention sets out the main idea and purposes of the convention:

“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”¹⁴¹

The same is expressed in the preamble of the Rome Statute about crimes against humanity, aiming to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”¹⁴²

¹³⁹ Gorman, J., “Historians and Their Duties”, *History and Theory*, Vol. 43 (4), Theme Issue 43: Historians and Ethics, December 2004, pp. 103-117, p 103

¹⁴⁰ See e.g. Fournet, C., “The crime of destruction and the law of genocide : their impact on collective memory”, Ashgate Publishing Limited, Hampshire, 2007, Introduction, p xxx: “But why remember? Why this urge to establish and maintain the memory of past events? The answer is simple: because such past events do not belong to the past. [...] Past occurrences of genocide do not belong to the past but are, on the contrary, extremely current. They have shaped our societies into post-genocidal societies in which the trauma of these genocides is very much present.”

¹⁴¹ UN General Assembly, *Prevention and punishment of the crime of genocide*, 9 December 1948, A/RES/260, art. 1, available at: <http://www.refworld.org/docid/3b00f0873.html> [accessed 26/04/2014]

The “trials involving genocide or crimes against humanity are less about judging a person than about establishing the truth of the events.”¹⁴³ Deterrence and retribution could be considered the two main aims of these trials.¹⁴⁴ The ability of the trial in achieving such aims has been critically questioned. Taking the criminal trial as it is – focusing on concrete subjects (perpetrators) and their guilt – the deterrence aim would assume a “criminal intent against which a person can be persuaded.”¹⁴⁵ The mass atrocities of 20th sadly-ironically have been carried not by criminal intent “but as offshoots from the desire to good.”¹⁴⁶

In situations where the acts constituting a crime against humanity are “aspects of political normality” or “take place in exceptional situations of massive destruction and personal danger when there is little liberty of action”, the ability to resist demands certain heroism which is not in the capacity of the criminal law to teach to people.¹⁴⁷ Having such heroism in the centre of the confrontation, especially when the trial is perceived as ‘victors’ justice’ might even lead to opposite outcomes, enabling the perpetrators present themselves as martyrs and affirm the righteousness of the ideology that normalised and caused the atrocities.¹⁴⁸ As for the retribution argument, the critique is directed first to the immeasurability of the harm caused by mass atrocities and the selectiveness of the trials – it is impossible to hold all the wrongdoers accountable.

These are the reasons for which arguments are raised, despite Hannah Arendt’s powerful critique concerning Eichmann trial in 1961¹⁴⁹, in support of the ‘show trials’, declaring an obligation “to conduct liberal show trials in traumatized societies” or arguing that “trials have a function not only for justice but also pedagogy.”¹⁵⁰ This approach, called a ‘symbolic function’ of the criminal law by Koskeniemi, is by some authors handled under the term ‘expressivism’ which aims at normative condemnation of such crimes that are ‘crimes against

¹⁴² Rome Statute, preamble.

¹⁴³ Koskeniemi, M., 2002, p 3

¹⁴⁴ See e.g. Elander, M., “The Victims’ Address: Expressivism and the Victim at the Extraordinary Chambers in the Courts of Cambodia”, *The International Journal of Transitional Justice*, Vol. 7, 2013, pp 95-115

¹⁴⁵ Elander, M., 2013, p 98

¹⁴⁶ Koskeniemi, M., 2002, p 8

¹⁴⁷ *Ibid*

¹⁴⁸ That was exactly what Milosevic did in ICTY or what happened at the trial of Djamila Bouhired, who had killed uncounted number of people by setting bombs in public places, defended by Jacques Verges, called an “advocate of terror” where Djamila became a hero, a courageous freedom fighter not only for Algerian separatists but for the world. See e.g. Minguet, S., “Save Djamila Bouhired”, translated by Abidor, M., *La Vérité des Travailleurs*, no. 81, first fortnight of April, 1958, copyleft in Creative Commons, Marxist.org, available at: <http://www.marxists.org/history/algeria/1958/save-djamila.htm> [accessed 12/04/2014]

¹⁴⁹ Arendt, H., “Eichmann in Jerusalem: A Report on the Banality of Evil” (1963), Rev. ed. Viking, New York, 1968

¹⁵⁰ Elander, M., 2013, p 99, referring to Osiel, M., “Mass Atrocity, Collective Memory, and the Law”, Transaction Publishers, New Brunswick, 1997 and Douglas, M., “The Memory of Judgement: Making Law and History in the Trials of the Holocaust”, Yale University Press, New Haven, 2001

humanity' (literally, in "non-technical" sense) so that the message of morality, the narration created would be "addressed across boundaries, to former enemy groups as well as generations, in order to ensure that lessons are not forgotten."¹⁵¹

First, as argued further by Elander on an example of the Extraordinary Chambers in the Courts of Cambodia, this approach does not fulfil its purpose of giving the victims back their dignity and dealing with the whole "complexity of human vulnerability in participating in atrocities", picking up "a simplistic narrative of innocence and victimhood" which in Cambodian case, where many victims were the cadre of Khmer Rouge and 93 per cent of the population considers themselves victims, definitely failed.¹⁵² As a remark, I think this example very accurately reflects the Communist regime, and especially Stalinism, as well:

"[T]he victims at Tuol Seng [genocide museum, *M.R.*] face the visitor as anonymous illustrations of imprisonment and torture in an urban context. For the vast majority of Cambodians who lived through the Khmer Rouge period, this is at odds with their experiences of rural life, famine, forced labor and terror."¹⁵³

Second, to be able to actually grasp the whole complexity of the events, time and distance is needed. It is well exemplified by trials of David Irving¹⁵⁴ in UK and Ernst Zündel¹⁵⁵ in Canada where professional historians were needed to make a decision. In the David Irving trial the court held that Deborah Lipstadt was not defaming David Irving when writing in her book that he "had manipulated and falsified historical documents; invented statistics; and mistranslated, misconstrued, and misused historical sources and historical works in his own publications in order to serve the cause of "Holocaust denial," his own extreme right-wing and anti-Semitic political views, and his ardent admiration for Adolf Hitler"; and in Ernst Zündel trial that Zündel could not "believe in good faith that these things [gas chambers and the mass murder of Jews, *M.R.*] had not happened"¹⁵⁶ and therefore, he had violated a rarely

¹⁵¹ *Idem*, p 101

¹⁵² *Idem*, p 106; see also Humphrey, M., 2003, p 185: Humphrey claims that "one of the real challenges for transitional justice is to be able to comprehend the depth of historical inequality and injustice which permits mass atrocity." Referring to a study on South African TRC by Allen Feldman he concludes that "the juridical positivist frameworks that inform truth commissions leave unexplained the origins of such excessive violence which is part of a structural violence and not merely 'bad apples'." This in-depth analysis is namely what historians do.

¹⁵³ *Idem*, p 114

¹⁵⁴ England and Wales High Court (Queens Bench Division), *Irving v. Penguin Books Limited, Deborah E. Lipstat*, 11/04/2000, EWHC QB 115, <http://www.bailii.org/ew/cases/EWHC/QB/2000/115.html> [accessed 12/04/2014]

¹⁵⁵ Supreme Court of Canada, *R. v. Zundel*, 27/08/1992, 2 S.C.R. 731, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/904/index.do> [accessed 12/04/2014]

¹⁵⁶ Evans, R., "History, Memory, and the Law: The Historian as Expert Witness", *History and Theory*, Vol. 41, October 2002, pp 326-345, pp 328-329

invoked article 181 of Canadian Criminal Code that prohibits deliberate publishing of false information.¹⁵⁷

Although “[k]nowledge has a different meaning and a different purpose for historians and lawyers; [...] beyond this, [...] both approaches to knowledge could find themselves gripped and instrumentalized by political imperatives dictated from outside when they became involved in such proceedings.”¹⁵⁸ Both – historians and lawyers – have to balance on the thin rope not to fall prey to political purposes, becoming a tool for political ‘power-games’ and remain at the same time to be in a service of a common good in a society, to be democratically open. The judge has to stop the trial from becoming a ‘show trial’ and simultaneously fulfil the task of “convey[ing] an unambiguous historical truth to its audience.”¹⁵⁹ A historian when giving moral judgements “should not be partial or biased, but [he] should judge when that is called for. This is to show respect, and has nothing to do with distorting historical facts.”¹⁶⁰ In the end of the day, both are aimed at one: establishing the truth about what happened.¹⁶¹

So, the mechanism in legal sphere is needed to protect the truth about past events, allowing at the same time to preserve nature and credibility of the law and protect history-science when intervening with the former. The right to truth is the substance regulating both truth-seeking disciplines – history and law – and relations between them. The right to truth shall apply in above-described situations like the ones where facts and evidence are being deliberately falsified. It shall apply for historians in their profession and also for the state in using history in the creation of national identity.

Moreover, the right to truth involves not only remembering but also forgetting that the hyper-visibility of a trial or truth-commission might not properly enable.

“Psychoanalysis teaches us that what is lost may not always be known and that grief may be misplaced. In melancholia, lost objects stay in the unconscious but they continue to haunt.”¹⁶²

The right to the truth applies not as a “melancholic tribunal”¹⁶³ but as a guarantor for the one forgetting (also when it is a societal level development) to be able to know *what* is to be

¹⁵⁷ “Everyone who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.” *R. v. Zündel* (1992)

¹⁵⁸ Evans, R., 2002, p 332

¹⁵⁹ Koskeniemi, M., 2002, p 35

¹⁶⁰ Gorman, J., 2004, p 115

¹⁶¹ Evans, R., 2002, p 332

¹⁶² Elander, M., 2013, p 115

forgot. This aspect also illustrates why the principle of good faith is not enough in the situations like the ones under scrutiny here – it is possible to argue that hiding or somehow modifying facts to make people feel better was carried by the good faith and intentions, which might be perfectly true but which also might be used to justify a blame manipulation for populist ends. To distinguish between use and abuse of *bona fide* principle in these situations by clarifying the real intention is extremely difficult at best. The right to truth on the other hand protects the factual truth as such, not intention of action.

2.1. Memory and History – Identity

“History forms a nation.”¹⁶⁴

Historical cognisance forms an inevitable part of the identity creation of both – an individual and a state. Ereshnee Naidu concludes her review essay on the book about the South-African TRC with the following conclusion: “[M]emory is more than just another of the ‘soft’ issues in the transitional justice field. Rather, it is central to questions of social justice and the rands and cents reality of postconflict reconciliation for ordinary South Africans.”¹⁶⁵ Indeed, the ‘nation building’ is an on-going and never-ending process in which the identities are being formed and re-formed at any time in any society, not only an emergency in post-crisis period.

In terms of the historical truth, it must be noted that history as such does not form a part of individual’s identity, memory does.¹⁶⁶ But history influences memory, especially public collective memory, historical consciousness is an inevitable part of one’s identity. Pakier and Stråth¹⁶⁷ pose a question in this light about why, during the last fifteen years, have the references to the past been made “in terms of memory rather than history” and point out that ‘memory’ as “an elastic concept [...] has lost ever more precise meaning in proportion to its growing rhetorical power.” They argue that “[t]he most common reasons for developing a usable past are related to individual and collective identity claims” and “[a] sense of sameness over time and space is sustained by remembering.”¹⁶⁸

¹⁶³ *Ibid*

¹⁶⁴ Appleby, J., Hunt, L. and Jacob, M., 1995, p 91

¹⁶⁵ Naidu, E., “Review Essay, Memory Beyond Transitions: The Role of Memory in Long-Term Social Reconstruction”, *The International Journal of Transitional Justice*, 2012, pp 1-11, p 5. The book reviewed: Grunebaum, H., P., “Memorializing the Past: Everyday Life in South Africa after the Truth and Reconciliation Commission”, Transaction Publishers, March 2011

¹⁶⁶ On distinction between memory and history see e.g. Nora, P., “Between Memory and History: Les Lieux de Mémoire”, *Representations*, No. 26, Special Issue: Memory and Counter-Memory, University of California Press, spring 1989, pp 7-24, p 8

¹⁶⁷ Pakier, M. and Stråth, B., “Introduction: A European Memory?” in Pakier, M. and Stråth, B. (eds.), “A European Memory. Contested Histories and Politics of Remembrance”, Berghahn Books, 2010, pp 1-25

¹⁶⁸ *Idem*, p 4

So they propose an answer: “The conceptual slide from history to memory clearly relates to the question of legitimacy.” But the actors creating cohesion and political legitimacy, unlike in 19th century, are not solely or even mainly historians anymore. “In the wake of Foucault it is not only history but epistemological schemes in general that are deemed ideological and more or less political.”¹⁶⁹ They call this phenomenon a ‘democratising dimension’ of the new conceptualisation of history which lessens the exclusive authority of professional historians and at the same time carries a ‘populist dimension’ “that runs the risk of manipulation and abuse – rather than use – of history.”¹⁷⁰

Based on that and on the location of history rather (and growingly) on the side of art on the “science-art axis” because of its unavoidable using of moral interpretations and narration, Pakier and Stråth consider the collective identity nothing more than a social and cultural construct, stating that “[i]ndividuals have memories but collectives have not, [a]s collective phenomena, memories are discourses based on processes of social work and social bargaining.”¹⁷¹ History is a mediated past, simplified and often generalised. A historian and a former soldier in WW II, Reinhard Koselleck “swore the right of the individual to his or her own inalienable memory as a part of human dignity” and talked about “the veto right of personal experiences.”¹⁷²

This is definitely one of the most difficult dilemmas also in the context of the right to historical truth about the crimes against humanity: so closely connected to human dignity, the right to the truth should somehow accommodate the account of rationalisation and individuality of history, as appositely uttered by Judith Miller:

“Abstraction is memory’s most ardent enemy. It kills, because it encourages distance, and often indifference. We must remind ourselves that the Holocaust was not six million. It was one plus one plus one. Only in understanding that civilized people must defend the one by one by one can the Holocaust, the incomprehensible, be given meaning.”¹⁷³

For the purposes of this research, the collective memory is understood as a sum of individual memories but it is not fully separable from social-cultural phenomena and group-

¹⁶⁹ *Idem*, p 5

¹⁷⁰ *Ibid*

¹⁷¹ *Idem*, p 6

¹⁷² *Idem*, p 7

¹⁷³ Heffner, R., Talkshow Series “The Open Mind”, a guest Judith Miller, “One by one by one”, 24/06/1990, available at: <http://www.thirteen.org/openmind/history/one-by-one-by-one/961/> [accessed 28/03/2014]. The quote is from the book of Judith Miller: Miller, J., “One, by One, by One: Facing the Holocaust”, Simon & Schuster, April 1990

psychological processes that make collective memory a communal phenomenon.¹⁷⁴ The memory politics, legislation and history as activities or narratives conducted, created or influenced by states shape them both, aiming at the influencing of individual identity in order to build the collective national identity and ‘come to terms with the past.’¹⁷⁵ History is distinguished from memory but in the context of this analysis mainly coincides with it because history as a carrier of evidence and facts about the past in its un-manipulated manner holds a value of its own, being an object of protection from populist abuse of it.¹⁷⁶

The relations between legal, social and historical *Vergangenheitsbewältigung* are well concluded by Caroline Fournet. She emphasises the importance of trials (or the absence of them) in shaping the memory because of the validity of the principle *res judicata pro veritate habetur* (what is tried must be considered as truth), i.e. the commission or omission of trials will be interpreted as truthful confirmation “that there were no criminals to be tried” or “that the crimes did happen and that the criminals deserved to be tried. *This confirmation will remain in social memory as ‘the truth’ and will thus participate in the collective recollection of past events.*”¹⁷⁷ [emphasis added, M.R.] So, ultimately, “with legal memory comes social memory and with social memory comes historical memory.”¹⁷⁸

2.2. The Types of Historical Truth

So, history as a discipline and subsequent narrative should be truthful, reflecting as much as possible history understood as a record of past events. What does that mean? Although the following discussion will focus on the right to truth outside the transitional period, I will borrow some terminology and concepts from the scholars of this area in order to determine the possible content of the historical truth in the context of human rights law and illustrate the complexity of the discussion about the truth.

¹⁷⁴ See e.g. Halbwachs, M., 1992 or Candau, J., “Mémoire et Identité”, Paris: PUF, 1998, pp. 21-25 referred in Lavenne, F-X., Renard, V. and Tolle, F., “Fiction, Between Inner Life and Collective Memory. A Methodological Reflection”, The New Arcadia Review, by Boston Colledge Honors Program, Memory and the Inner Life, Vol. 3, 2005, available at: <http://www.bc.edu/publications/newarcadia/archives/3/fiction/> [accessed 23/04/2014]

¹⁷⁵ Origins of the concept lay in German term *Vergangenheitsbewältigung* which describes processes of dealing with the past first brought into the discourse by Theodor W. Adorno. “The translation “coming to terms” is applied in accordance with the English/American publication of his piece “What Does Coming to Terms with the Past Mean?” (in Bitburg in Moral and Political Perspective, ed. Geoffrey H. Hartman [Bloomington, Ind., 1986], pp. 114-29); also “reappraisal” or *Aufarbeitung* are employed occasionally, referring to a narrower scope of use. Footnote in Lüdtkke, A., ““Coming to Terms with the Past”: Illusions of Remembering, Ways of Forgetting Nazism in West Germany”, The Journal of Modern History, Vol. 65, No. 3, September 1993, pp. 542-572, p 542. In the context of this research ‘coming to terms with the past’ or *Vergangenheitsbewältigung* is understood in wide terms.

¹⁷⁶ See e.g. the French movement *Liberté pour l’Histoire* (Freedom for History) whose main slogan was: “Freedom for history is freedom for all!”, <http://www.lph-asso.fr/>

¹⁷⁷ Fournet, C., 2007, Introduction, p xxxii

¹⁷⁸ *Ibid*

In very wide terms it is possible to distinguish between forensic and narrative truth as argued by Richard A. Wilson in the context of South-Africa. For him forensic truth represents “a legal and scientific notion of uncovered facts and corroborating evidence – [...] investigations of the causes and patterns of violence as well as individual incidents of gross violations of human rights;” narrative truth includes three categories of “personal, social, and healing or restorative truth”, emphasising “narrative, subjectivity, and the experiential dimensions of truth telling.”¹⁷⁹ Truth and Reconciliation Commission of South-Africa itself was guided by four types of truth: “factual or forensic truth; personal or narrative truth; social or ‘dialogue’ truth (see below) and healing and restorative truth.”¹⁸⁰

Juan Mendez proposes a distinction between structural (“establishes [...] patterns of violence; the nature, scope, and methods of repression; and the responsibility for the planning and execution of this repression”) and individualised (“provides details about individual disappearances, [...] the exact circumstances, location, and fate of disappeared individuals”) truth.¹⁸¹ Reflecting the other types, the couple of “knowledge” and “acknowledgment” clearly represents the different aims and effects of different types of truth which could be summarised in two main categories: forensic fact-revealing and personal healing of victims and survivors.¹⁸²

These two aims in my opinion vastly resemble the nature of history and historiography as opposed to memory. Using a description of a French historian Pierre Nora, very well summarised and quoted by Judith M. Panitch:

“[M]emory, specifically collective memory, [i]s a sort of living heritage, the “unself-conscious, commanding, all powerful” repetition of tradition that links a society to its past. Opposed to memory is history, “which is how our hopelessly forgetful modern societies, propelled by change, organize the past [H]istory is a representation of the past,” which attempts to analyze, totalize, and make sense of it.”¹⁸³

¹⁷⁹ Wilson, R. A., “The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State”, Cambridge University Press, Cambridge, 2001, pp 36-37, summarised in Borer, T. A., 2006, p 21 (quotes from Borer)

¹⁸⁰ Truth and Reconciliation Commission of South Africa, *Report. Volume I. Chapter V: Concepts and Principles*, presented by president Nelson Mandela on 29 October 1998, p 110, available at: <http://www.justice.gov.za/Trc/report/finalreport/Volume%201.pdf> [accessed 20/03/2014]

¹⁸¹ Mendez, J., 2006, pp 115-144, summarised in Borer, T. A., 2006, p 22

¹⁸² Borer, T. A., 2006, p 22

¹⁸³ Panitch, J. M., “Liberty, Equality, Posterity?: Some Archival Lessons from the Case of the French Revolution”, Jimerson, Randall C. (ed.), *American Archival Studies : Readings in Theory and Practice*, (Chicago, Society of American Archivists), 2000, pp 101-122, p 120, referring to Nora, P., “Between Memory and History: Les Lieux de Mémoire”, *Representations*, No. 26, Special Issue: Memory and Counter-Memory, University of California Press, spring 1989, pp 7-24, p 8

It is clear that all these aspects represented in different types of truth are important from the point of view of reconciliation and coming to terms with its past of the society. Both of the wide concepts (forensic and narrative) are viewable through human rights lenses in general. E.g. the freedom of expression concerns both, forensic and narrative truth: the widespread legislation on the denial of Holocaust in Europe prohibits the denial of facts but also revisionism and justifying of it;¹⁸⁴ the court practice rather focuses on factual truth protection interpreting those provisions, distinguishing denial of ‘clearly established historical facts’ from interpretation¹⁸⁵ (protecting thereby foremost forensic truth).

The wider purpose of that prohibition however is the protection and preservation of memory as such, the respect of the dignity of the victims, their heirs and prevention through promoting objective knowledge and understanding on the crux and functioning of the ‘regime of evil’.¹⁸⁶ The prohibition of the hate speech does not make this distinction but bans any act inciting hatred and might often *inter alia* include the protection of truth.¹⁸⁷

Viewing through the lenses of the right to truth as an independent norm or principle of international human rights law, the discussion above leads to the conclusion that mainly the protection of forensic truth lays in the auspices of this right or principle. Only this type of truth, as argued by Richard A. Wilson in his book on South-African TRC, is an end in itself – “that end being the creation of knowledge about the past.” The narrative truth according to him “is a means to a different end, such as healing or affirming the dignity of survivors.”¹⁸⁸

Drawing from a notion of the intrinsic value of the truth in legal system and the purpose of dealing with history by state, it might be concluded that the narrative truth is protected under

¹⁸⁴ E.g. in France, Austria, Germany, Chzech Republic etc. The memory legislation in Europe will be elaborated below.

¹⁸⁵ E.g. “[i]n 1994, the Federal Constitutional Court of Germany defined Holocaust denial to be “claiming as fact something that, on the basis of countless witness accounts and documents, the statements of the court in numerous criminal cases, and the findings of historical research, has proven to be untrue. In itself, the assertion of this content does not therefore enjoy the protection of freedom of opinion.” Leggewie, C., “Seven circles of European memory”, translated by Garnett, S., Eurozine, 20/12/2010, pp 1-19, p 3 available at: <http://www.eurozine.com/pdf/2010-12-20-leggewie-en.pdf> [accessed 25/03/2014]

¹⁸⁶ See e.g. Smith, R. W., “Legislating against Genocide Denial: Criminalizing Denial or Preventing Free Speech?”, Genocide Prevention Now, spring 2011, available at: <http://www.genocidepreventionnow.org/Home/GPNISSUES/GPNBulletinLAWSAGAINSTDENIALSpecialSection9/tabid/164/ctl/DisplayArticle/mid/971/aid/209/Default.aspx> [accessed 20/04/2014]

¹⁸⁷ See e.g. Berrigan, H., G., ““Speaking Out” about Hate Speech”, Loyola Law Review, Vol 48, No. 1, 2002, pp 1-16, pp 8-9. The concept of a “marketplace of ideas envisions a market of equal access and opportunity to be heard, so that out of a cacophony of voices, the “truth” will prevail. Dominant views have no difficulty setting up shop on the main street of public opinion. Minorities are fewer in number, and those subject to historic discrimination have significantly less political or economic leverage to be heard. To the extent that hate speech contributes its ugly perspective, it does double damage. [...] The minority loses more of its voice, and the dominant groups lose the benefit of that perspective. What then surfaces as the “truth” may be nothing more than the survival of the fittest, the more dominant views reinforcing themselves.”

¹⁸⁸ Wilson, R. A., 2001, pp 36-37, summarised in Borer, T. A., 2006, p 22 (quotes from Borer)

the right to truth as much as it must be in compliance with the forensic truth. Paraphrasing Juan Mendez (cited above), the provision of the narrative truth for the society cannot ‘value lies over truth,’ doing so the state would be ‘abusing – rather than using – history’.

Before moving to the more concrete legal perspective and expression of the right to the historical truth in peace-time context I will shortly describe the framework of the two dark historical inheritances of Europe: Holocaust and Communist crimes.

2.3. Two Circles of ‘European Memory’: Holocaust and Gulag¹⁸⁹

“If legal memory remains absent, the emergence of social or collective memory will either prove impossible or will, at best, encounter serious obstacles and difficulties. [...] The lack of trials or their clear shortcomings” cause a “legal oblivion, soon followed by social and collective amnesia.”¹⁹⁰

A good example of the impact of the lack of legal memory is the subject-handling of Communist crimes in Europe. Holocaust is the dark centre of European collective memory, “Europe’s negative founding myth.”¹⁹¹ This is not because German *Vergangenheitsbewältigung* has spread over Europe but because “anti-Semitism and fascism were pan-European phenomena: the murder of the Jews would have been impossible without the broad collaboration of European governments and citizens.”¹⁹² Claus Leggewie points out that “[r]emembrance of the Holocaust has always possessed a contemporary, political-pedagogic facet directed at the present and at the future: Theodor W. Adorno’s famous plea was that the Holocaust be remembered so that “Auschwitz is not repeated.””¹⁹³ The Nuremberg trials and further legislation on the memory of Holocaust have well guaranteed the avoidance of the ‘legal oblivion’ or ‘social and collective amnesia’ about it in the whole Europe.

The same does not apply for Communist crimes that took place in Europe in comparable or even bigger magnitude and cruelty before Holocaust, simultaneously with it and after that. This other circle of evil and inhumanity of Europe has found significantly less acknowledgment and investigation. Maria Mälksoo argues that “the asymmetry in the remembering and research” on criminal record of the Soviet crimes in comparison to the Nazi crimes, besides Nazism being more immanent to the main history writers of Europe, “could

¹⁸⁹ The metaphor is borrowed from Leggewie, C., 2010, referred above (“Seven Circles of European Memory”)

¹⁹⁰ Fournet, C., 2007, Introduction, pp xxxi-xxxii

¹⁹¹ Leggewie, C., 2010, p 1

¹⁹² *Ibid*

¹⁹³ *Idem*, p 2

also be attributable to the simple fact that there has never been a Soviet Nuremberg process of a sort which, after all, made technically possible the documentation of the crimes of Nazism in the first place.”¹⁹⁴ As a result “the 20th-century history of Europe has arguably largely bypassed the Eastern European component, thus leading to a ‘one-legged, one-sided, one-eyed’ account of Europe’s immediate past.”¹⁹⁵

The memory of Communist crimes is however alive in the affected societies, the ‘social and collective amnesia’ was, despite Soviet Union’s forceful policy towards it, not fully achieved. With the collapse of the SU in the first place and after their accession to the EU and NATO later, the countries suffered under communist crimes (especially Baltic states and Poland) have started to bring their memory back in the picture (first in their own countries and later in the whole Europe).¹⁹⁶ Besides the moral (and legal) claim that Europe has an obligation to remember and preserve history of all its parts in order not to lose its “moral compass”, these countries also insist on security claims, stating that “the re-evaluation of the dark spots of history builds confidence and promotes cooperation among states.”¹⁹⁷

From the point of view of the right to truth one has to agree with Claus Leggewie in that “[i]f the denial of the Holocaust is punishable across much of Europe, then this logically enough encourages demands that the horrendous aspects of communism be dealt with in an equivalent manner.”¹⁹⁸ Thus, the former Estonian president Lennart Meri

“remarked with some irony in the early 1990s that everybody was talking about the death of communism, yet no one had actually seen its body. The Polish and Baltic endeavours to seek international condemnation of the crimes of the communist regimes in Central and Eastern Europe could be regarded as attempts to reify the very demise of communism, or, indeed, to disinter its ‘body’.”¹⁹⁹

The ‘disintering of communism’s body’ and ‘reifying the very demise of communism’ are visibly directed to the search for the historical truth. The question only remains, in what way should the right to truth in the current case be evoked and what would that entail?

¹⁹⁴ Mäliksoo, M., “The Memory Politics of Becoming European: The East European Subaltern and the Collective Memory of Europe”, *European Journal of International Relations*, Vol. 15(4), 2009, pp 653–680, p 661.

¹⁹⁵ *Ibid*

¹⁹⁶ *Idem*, p 656, Maria Mäliksoo describes this process as “Eastern Europe’s post-EU accession ideological decolonization.”

¹⁹⁷ *Idem*, p 661, referring to Pabriks, A., ‘Address of the Minister of Foreign Affairs of the Republic of Latvia to the Conference “Coming to Terms with History: Building Mutual Confidence and Cooperation in the Baltic Sea Region”, Copenhagen, 28 April 2005

¹⁹⁸ Leggewie, C., 2010, p

¹⁹⁹ Mäliksoo, M., 2009, p 661, referring to Meri, L., ‘Speech by the President of the Republic at the Presentation of the Estonian Translation of The Black Book of Communism’, Tallinn Town Hall, 12 December, 2000

2.4. The Right to the Truth and Memory Laws

“[P]erhaps the 'last victim of any genocide is truth.'”²⁰⁰

As established above, the right to truth cannot be limited to transitional period, it would contradict the provision and idea of Rome Statute and Genocide Convention (as implicitly giving basis for the right to truth), the nature and character of the right to truth itself but also, as will be shown below, the underlying idea of human rights in general. This chapter attempts to analyse the expression of the right to truth in peace-time by providing some most noteworthy examples of legislation and court practice on memory and history in Europe, presenting and analysing the main philosophy and rationale behind the legislation on history from the foundational view-points of both – *pro et contra* – advocates.

2.4.1. Balancing between ‘Duty to Remember’ and the Freedom of Expression

The above-referred Principles of Impunity, under the right to know, establish the ‘duty to preserve memory’ (principle 3):

“A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at *preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.*”²⁰¹
[emphasis added, *M.R.*]

This is also the reasoning behind and the spirit of the laws on the denial or minimisation of the Holocaust or other crimes against humanity (which will be elaborated below). In words of Caroline Fournet: “Behind the expression ‘duty of remembrance’, there is [...] a wider imperative: although it does obviously encompass the obligation to recall past occurrences of genocide, it in fact only acquires its full meaning if understood as also implying the obligation to use such recollection of the past to act both in the present and for the future.”²⁰²

There are very strong justifications for adopting the laws against genocide denial, all well reflecting the ‘duty to remember’. An American genocide scholar Roger W. Smith:

“Denial of well-documented genocides and of crimes against humanity is deeply offensive to survivors, their descendents, and all those who care about fellow humans without regard to ethnic,

²⁰⁰ Cohen, R., “Killing Truth”, The Washington Post, 31 May 1983, p. B 1, reference in Roger, R., W., Markusen, E., Lifton, R. J., 1995, endnote 2, p 17

²⁰¹ Principles of Impunity. The Right to Know. General Principles: principle 3

²⁰² Fournet, C., 2007, Introduction, pp xxx-xxxi

racial, or religious identity. [...] [W]ith denial comes silence, and if individuals, groups, and states do not remember and do not resist denial, their inaction sends a signal that genocide and crimes against humanity can be committed with impunity. The lesson can be drawn: commit genocide and deny it. In due time, the world will forget it ever happened or set it aside out of expediency.”²⁰³

But there are also serious questions to be asked and carefully answered when deciding the adoption of such laws. Is that an effective method for reconciliation and tolerance? Might the law become not a solution but part of the problem itself, officialising one version of history and thereby provoking tensions? What are the global or international-political impacts of such moves? Roger W. Smith discusses the situation in the light of article 301 of Turkish Criminal Code that prohibits not denial but acknowledging of the Armenian genocide as “insulting Turkishness” which has actually been used to try people (including Nobel Prize winner Orhan Pamuk).²⁰⁴ This is a good example of law becoming a tool of politics and thereby also politicising history.

That leads us to the central issue in the debate on memory laws: democratic freedoms (mainly the freedom of expression) and independency of professional history versus protection of public order and safety, the dignity of survivors, their heirs, and even the humanity in a society. Timothy Garton Ash, a British historian and political writer has initiated a website called Free Speech Debate run by Oxford graduate students in 13 languages aiming at promoting a debate on how the freedom of speech should be regulated. Principle 5 out of ten principles of free debate reads: “We allow no taboos in the discussion and dissemination of knowledge.”²⁰⁵ What about propaganda and deliberate falsehood, i.e. *un-knowledge*?

An article by Josie Appleton on the same website well exemplifies the tensions and counter-arguments for legal regulation of history. The article is based on an interview with a French historian Pierre Nora, a leading figure of the movement *Liberté pour l'Histoire* created as a reaction to a law adopted by French National Assembly obliging schools to teach about the positive impact of the French presence abroad, particularly in North Africa.²⁰⁶ The provision was abolished and simultaneously held process against a historian Olivier Pétré-Grenouilleau, who was accused of the “‘denial of a crime against humanity’, after he said in an interview that in his view the slave trade was ‘not a genocide’ since ‘it didn’t have the goal of

²⁰³ Smith, R. W., 2010

²⁰⁴ *Ibid*

²⁰⁵ Free Speech Debate: Thirteen Languages. Ten Principles. One Conversation. <http://freespeechdebate.com/en/> [accessed 13/04/2014]

²⁰⁶ Pakier, M. and Str  th, B., 2010, pp 1-25, p 10

exterminating people,”” withdrawn.²⁰⁷ Paradoxically, Olivier Pétré-Grenouilleau is a historian who has done a lot to disclose the history of slavery. In 2005 he received an award from a Senate for “a historical work that meets scholarly standards and also contributes to the citizens’ education.”²⁰⁸

As a result of the appeal by *Liberté pour l’Histoire* also the prohibition of the denial of Armenian genocide was declared unconstitutional by the Constitutional Council, “which found in a landmark decision on 28 February 2012 that the law was unconstitutional on the grounds of infringement on freedom of expression.”²⁰⁹ Thus “[a] 2008 parliamentary enquiry – at which *Liberté Pour l’Histoire* gave the opening and closing testimonies – issued the resounding conclusion that government should refrain from legislating on history.”²¹⁰ The main slogan of the movement is “liberty for history is liberty for all”.²¹¹

The case of Pétré-Grenouilleau represents an example how legislation can enable political struggles and interests of certain groups and seriously inhibit the independence of historians and freedom of expression in general.²¹² It is no wonder that his colleagues stood up in the protection of their whole profession and in this context it is not exaggerated to say that “they acted in the name of the right of every citizen to have access to unbiased knowledge of history.”²¹³

But do memory laws necessarily have to be in conflict with the freedom of history? Does this derive from the nature of those laws or is it rather a question of implementation of them? Is it possible to overcome the problem of lacking legal memory which, according to Fournet may cause ‘legal oblivion’ and ‘collective social amnesia’? What about the groups and individuals actually justified to receive reparation for injustices that took place maybe even centuries ago

²⁰⁷ Appleton, J., “Freedom for history? The case against memory laws”, Josie Appleton talks to Pierre Nora and Olivier Salvatori of the ‘*Liberté pour l’Histoire*’ initiative in France, 3/04/2013, <http://freespeechdebate.com/en/discuss/freedom-for-history-the-case-against-memory-laws/> [accessed 27/03/2104]

²⁰⁸ Rémond, 2006

²⁰⁹ Appleton, J., 2013. See also Constitutional Council (*Conseil Constitutionnel*), 28/02/2012, 2012-647 DC, para. 6: “Considering that a legislative provision having the objective of “recognising” a crime of genocide would not itself have the normative scope which is characteristic of the law; that nonetheless, Article 1 of the law referred punishes the denial or minimisation of the existence of one or more crimes of genocide” recognised as such under French law”; that in thereby punishing the denial of the existence and the legal classification of crimes which Parliament itself has recognised and classified as such, Parliament has imposed an unconstitutional limitation on the exercise of freedom of expression and communication; that accordingly, without any requirement to examine the other grounds for challenge, Article 1 of the law referred must be ruled unconstitutional. [...]”, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-647-dc-of-28-february-2012.114637.html> [accessed 27/03/2014]

²¹⁰ Appleton, J., 2013

²¹¹ *Ibid*

²¹² Rémond, R., 2006

²¹³ *Ibid*

(like the slavery cases in US²¹⁴)? What about the ‘common European memory’ project and giving voice to sufferings of Eastern and Central Europeans, the victims of Communist crimes?

Turning back to Hannah Arendt, memory laws may be justified if they embody the truth as ‘the highest criterion,’ fulfilling namely that task to restrict any political power-struggles in the field of history and memory, preventing also possible manipulation by historians themselves: historians, possessing professional credibility, have very strong position in falsifying any factual truth for political purposes (e.g. David Irving or Robert Faurisson²¹⁵ cases) and eventually ‘manipulate it out of the world’. The ultimate purpose of the law in the field of history should be balancing and alleviating such risk by balancing the power of manipulation of opinions:

“The chances of factual truth surviving the onslaught of power are very slim indeed; it is always in danger of being maneuvered out of the world not only for a time but, potentially, forever. Facts and events are infinitely more fragile things than axioms, discoveries, theories – even the most wildly speculative ones – produced by the human mind; they occur in the field of the ever-changing affairs of men, in whose flux there is nothing more permanent than the admittedly relative permanence of the human mind’s structure. **Once they are lost, no rational effort will ever bring them back.**”²¹⁶
[emphasis added, *M.R.*]

Exactly the same presumption gives ground for historians to talk about the utmost importance of the ‘unbiased knowledge of history’ and resist the post-modernism apologetics who suggest that history is mere literature, creating one of the many narratives and changing according to the present needs.²¹⁷ “My job as a historian is to present the truth,” one historian claims.²¹⁸ “The use of history lies in its capacity for advancing the approach to truth,” says the

²¹⁴ See a thorough analysis in McCarthy, T., “Coming to Terms with our past, Part II: On The Morality and Politics of Reparations for Slavery”, *Political Theory*, Vol. 32 (5), 2004, pp 750-772

²¹⁵ UN Human Rights Committee of ICCPR, *Faurisson vs. France*, 16/12/1996, CCPR/C/58/D/550/1993. “In this regard the Committee concludes, on the basis of the reading of the judgment of the 17th *Chambre correctionnelle du Tribunal de grande instance de Paris* that the finding of the author's guilt was based on his following two statements: "... I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication". His conviction therefore did not encroach upon his right to hold and express an opinion in general, rather the court convicted Mr. Faurisson for having violated the rights and reputation of others. For these reasons the Committee is satisfied that the Gayssot Act, as read, interpreted and applied to the author's case by the French courts, is in compliance with the provisions of the Covenant.”

²¹⁶ Arendt, H., 1993, p 231

²¹⁷ Like above-discussed Michel Foucault or Frank Angersmit. For critical analysis of Angersmit’s writing see Zagorin, P., “Historiography and Postmodernism: Reconsiderations”, *History and Theory*, Vol. 29 (3), 1990, pp 263-274.

²¹⁸ Pearson, I., “An Instance of the Fingerpost”, London, Vintage, 1998, p 561, in Gorman, J., 2004, p 111

other and continues: “What is the truth? Mighty above all things, it resides in the small pieces which together form the record.”²¹⁹

People can be deprived of truth by hiding it (which can also take legitimate forms falling under the scope of the right to information, like e.g. state secret in some circumstances). The unwelcome (historical) truth can definitely be hidden in totalitarian regimes – a good example is Soviet Union where some people and events threatening the power of Stalin or Communist party were simply ‘erased’ from history, or Hitler’s Germany. “[I]t was more dangerous to talk about the concentration and extermination camps, whose existence was no secret, than to hold and utter ‘heretical’ views on anti-Semitism, racism and Communism.”²²⁰ In free countries the problem is different, there “unwelcome factual truths are tolerated” but “they are often, consciously or unconsciously, transformed into opinions – as though the fact of Germany’s support of Hitler or of France’s collapse before the German armies in 1940 [...] were not a *matter of historical record* but a *matter of opinion*.”²²¹ [emphasis added, *M.R.*]

That does not mean that opinions must not be held but that deliberate lying with the aim of creating a ‘buyable good’ on market of opinions should not be tolerated. People should be able to make their decisions and create opinions and thoughts on truthful information: “opinions, inspired by different interests and passions, can differ widely and still be legitimate as long as they respect factual truth.”²²² Moreover, the freedom of opinion should not be opposed to the protection of truth, as it would be “a farce unless factual information is guaranteed and the facts themselves are not in dispute.”²²³ In the context of history writing, Arendt argues that even when we agree that “every generation has the right to write its own history,”²²⁴ we mean the right to rearrange the facts deriving from its own perspective, not “the right to touch the factual matter itself.”²²⁵

So, the circumvention of the lack of knowledge, manipulation of it and obliviousness is the common aim of both – wide freedom of expression and memory laws. To quote Arendt once again:

“Since such factual truths concern issues of immediate political relevance, there is more at stake here than the perhaps inevitable tension between two ways of life within the framework of a common and

²¹⁹ Handlin, O., “Truth in History”, Cambridge, Mass: Belknap Press, 1979, p 405, referred in Gorman, J., 2004, p 111

²²⁰ Arendt, H., p 236

²²¹ *Ibid*

²²² *Idem*, p 238

²²³ *Ibid*

²²⁴ *Idem*, p 238-239

²²⁵ *Idem*, p 239

commonly recognized reality. *What is at stake here is this common and factual reality itself.*²²⁶
[emphasis added, *M.R.*]

Is politics then a common enemy to both? Not necessarily and not entirely.

John Torpey makes an argument that acknowledgment of the corporate responsibility, the continuity of corporate bodies, such as nations, enables to come to terms with the past.²²⁷ “[T]he pre-occupation with past crimes and atrocities [...] promotes attention to once neglected suffering of victims and bears witnesses to an enhancement of their status vis-à-vis the perpetrators,” sharply questioning the idea of Thucydides in “Melian Dialogue” that “the standard of justice depends on the equality of power ... [;] the strong do what they have the power to do and the weak accept what they have to accept.”²²⁸

The idea of law, and especially human rights, is namely to set limits for such arbitrary power-politics. As Torpey notes, the *Wiedergutmachung* is “an essential complement to the spread of human rights ideas,” helping “to make the notion of human rights seem real and enforceable in the absence of a global police force empowered to back rights claims with armed might.”²²⁹

Reparation-claims are many-fold but they all assume dealing with history, they assume legal memory, disclosing of facts, understanding of causal relations etc. And again, collective reparations, acknowledgement needed thereto, cannot be narrowed down solely to courts, to trials, either civil or criminal, without them becoming ‘show trials’ and without making law a tool of popular history education or ‘expressivist’ Messiah. So the law needs to deal with history and so does politics. A legislator has to create an environment allowing individual claims in concrete areas but also provide societal equality and justice without it. Through the protection of historical truth, memory laws can fulfil these tasks.

It might be said that legal and political dealing with the past is needed to avoid malicious manipulation of public memory and identity, to promote justice and equality by forbidding the falsification and manipulation of truth. No-one is opposing the ‘democratising’ tendency of history and memory: the aim of both of the sides is to enable people make use of the knowledge, to understand the past and each-other, to act for a better future. ‘Coming to terms’ means reconciliation and peaceful coexistence not just in history seminars among professionals and parliamentary commissions but among ‘ordinary’ people. The French historian René Rémond, one of the signatories of the discussed appeal, explains:

²²⁶ *Idem*, p 236-237

²²⁷ Torpey, J., 2003, p 5

²²⁸ *Idem*, p 1-2

²²⁹ *Idem*, p 5

“[H]istorians do not claim a monopoly on the past: they simply possess professional competence. [...] In protesting against the principle underlying these historical memory laws, historians remind us of the need to respect the differences between roles and spheres, even as they reaffirm that the domain of history, the guardian of our collective memory of the past, belongs to everyone.”²³⁰

So, the question is about balance and concrete ways, the concrete content of a concrete law and its implementation. “The scholarly pursuit of the past can be political, and hence contribute to revealing the subterranean aspects of the past, but it fails if it becomes politicized, subservient to narrowly political interests.”²³¹ Law, as argued above, should be one of the a-political ‘civilisers’ carrying the value of truth and truthfulness as its highest criterion, thereby walking hand in hand with scholarship. The principle of the right to truth draws a connecting line.

2.4.2. The Memory Laws and Court Practice in Europe

The conclusion to be made based on the previous discussion is that memory laws might be legitimate means in case they protect the factual truth or other human rights through that. I will now turn to elaborate the memory laws in Europe on the example of Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law of the EU and have an insight into how courts, especially ECtHR have implemented and interpreted respective provisions of national laws.

2.4.2.1. European Memory Laws – the Scope and Purpose

The Framework Decision is not foremost aimed at protecting the historical truth. As the name says, its purpose is “combating racist and xenophobic offences [...], by promoting a full and effective judicial cooperation between Member States.”²³² However, it entails article 1 (1) (c) and (d), which state that all the member states should incriminate the following activities:

“publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court (hereinafter ‘ICC’); or the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, when the conduct is carried out in a manner likely to incite violence or hatred against such a group or one or more of its members.”²³³

²³⁰ Rémond, R., 2006

²³¹ Torpey, J., 2003, p 26

²³² The Council of the European Union, *Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law*, 2008/913/JHA, 28 November 2008, L 328/55 (hereinafter *Framework Decision*)

²³³ *Idem*, art. 1(1) (c-d)

The respective legislation of member states was supposed to be in compliance with the Framework Decision by 28 November 2010.²³⁴ In 2014 the European Commission published a report on the results.²³⁵ Concerning genocide, crimes against humanity and war crimes as defined in articles 6, 7 and 8 of the Rome Statute, altogether fifteen states incriminate denial, condoning or trivializing those crimes.²³⁶ Thirteen member states “have no criminal-law provisions governing this conduct,” whereas, importantly, “Germany and Netherlands state that national case law applicable to Holocaust denial and/or trivialisation would also apply to the conduct covered by this article.”²³⁷

Concerning crimes of genocide, crimes against humanity and war crimes as defined in article 6 of the Charter of Nuremberg tribunal, the denial of Holocaust is prohibited and criminally sanctioned in altogether twelve European countries.²³⁸ Six countries “make reference to the *National Socialist regime* or *Nazi Germany* as the relevant perpetrators of these crimes.”²³⁹ Interestingly, “Lithuania and Poland limit the incrimination by referring to crimes committed by the National Socialist regime *against the Lithuanian or Polish nation or citizens*, respectively, with Poland making reference only to denial in this respect.”²⁴⁰

Fifteen countries “have no specific provisions criminalising this form of conduct” but “Netherlands, Finland and UK have submitted sentencing rulings for trivialisation, condoning and denial of the Holocaust, based on criminal-law provisions punishing respectively incitement, ethnic agitation or stirring up of hatred.”²⁴¹

There is a big number of countries who have adopted specific legislation against the denial of certain crimes against humanity but also a number of states who consider legislation on different forms of the incitement of hatred and violence sufficient to deal with the issue. Majority of the European countries do not mention Communist crimes explicitly, significant

²³⁴ *Idem*, art. 10

²³⁵ European Commission, *REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, 27 January 2014, COM/2014/027/final

²³⁶ *Idem*, Bulgaria, Croatia, Cyprus, Luxemborug, Lithuania, Malta, Slovenia, Slovakia, Spain, France, Italy, Poland, Portugal, Latvia and Romania.

²³⁷ *Idem*, no criminal law regulation: Belgium, Czech Republic, Denmark, Germany, Estonia, Greece, Ireland, Hungary, Netherlands, Austria, Finland, Sweden and United Kingdom

²³⁸ Austria, Belgium, Czech Republic, France, Germany, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, and Switzerland. It has been abolished relatively recently in Spain (2007) and Slovakia (2005). See Smith, R., 2011

²³⁹ Report, (Belgium, Czech Republic, Germany, Lithuania, Hungary and Austria)

²⁴⁰ *Idem*

²⁴¹ *Idem*, no specific regulation in Bulgaria, Denmark, Estonia, Greece, Ireland, Spain, Croatia, Italy, Latvia, Malta, Netherlands, Portugal, Finland, Sweden and UK

exceptions are Czech Republic, Poland, Hungary and Lithuania.²⁴² Anyway, the definitions given in the Framework Decision, referring to crimes against humanity and war crimes as defined in the Rome Statute and London Agreement should include the Communist crimes. That assumption has found confirmation also in the case-law of ECtHR in the ruling of the Grand Chamber in *Kononov vs. Latvia*, where the court held that the standard of Nuremberg Tribunals is universal and “in terms of war crimes, the winners of World War II can be measured by the same normative yardstick that they were themselves instrumental in establishing.”²⁴³ The establishment of Communist crimes in legal memory has not met further success however.

An American scholar Laurent Pech, criticising the Framework Decision, argues that there is a lack of universal consensus on the “question of whether genocide-denial must be criminally prohibited [...], [w]hile “hate speech” has long been outlawed on the basis of specific provisions contained in several international instruments.”²⁴⁴ Indeed, adding those provisions in the document the aim of which is fighting racism and xenophobia, shows, in line with the argumentation on the role of memory laws above, the need to protect certain historical truth as a value on its own, and/or that denial or trivialisation of those crimes is considered an act of incitement of hatred. Differently from inciting hatred or violence, where the malicious intent derives from the very notion and definition of the act, in case of denying (or condoning or trivialising) historical facts, it is assumable (as will be discussed below) but not a necessary component by the definition of the respective provision (paragraph 2 of the same article allows states to add that clause optionally). Therefore it is assumable that the first aim is very strong or even prevalent in the Framework Decision.

The minutes from the adoption of the decision declare that it

“is limited to crimes committed on the grounds of race, colour, religion, descent or national or ethnic origin. It does not cover crimes committed on other grounds, e.g. by totalitarian regimes. However, the Council deplores all of these crimes.”²⁴⁵

²⁴² Mälksoo, M., “Criminalizing Communism: Transnational Mnemopolitics in Europe”, *International Political Sociology*, Vol. 8, 2014, pp 82–99, p 82

²⁴³ Mälksoo, L., “Kononov v. Latvia”, *The American Journal of International Law*, Vol. 105 (1), January 2011, pp. 101-108, p 107. Article is based on ECtHR (Grand Chamber), *Kononov vs. Latvia*, Judgement of 17 May 2010, Application no. 36376/04, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98669> [accessed 20/04/2014]

²⁴⁴ Pech, L., “The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition”, *Jean Monnet Working Paper*, New York University School of Law, October 2009, p 40

²⁴⁵ Council of the European Union, 2794th Council meeting, *Press release. Justice and Home Affairs*, Luxembourg, 19-20 April 2007, 8364/07 (Presse 77), pp 23-25, p 24

Communist crimes were, according to a most common understanding²⁴⁶, directed to the destruction of a political group – Kulaks or *borjois* – clearly excluded from the binding legal scope of the decision, although the Council ‘deplores them’.

In 2010 the proposal of Eastern European countries to introduce a so-called “double genocide” into EU law, to treat the Communist crimes “according to the same standards as those of Nazi regimes, notably in those countries with Holocaust denial laws” was rejected by the Commission because there is no consensus on the question: “[a]t this stage, the conditions to make a legislative proposal have not been met. The commission will continue to keep this matter under review.”²⁴⁷ If conditions for this legislative proposal have not yet been met, neither should they be for the other ‘circle’ of European memory. The real reasons are much more likely political: the attempt to bring Communist crimes into the legal memory is taken as “a thinly-veiled attempt at rehabilitation of domestic collaborators while antisemitism remains a live issue on the streets and in the media in the east”²⁴⁸ or “political relativism, threatening to “dilute the unique nature of the Nazi crimes.””²⁴⁹

The exclusion of acts of the same category for a reason that they took place on different grounds does not seem plausible in the light of the aims of the provision. According to Carolin Fournet the denial of genocide is a genocidal act in itself, continuing the genocide:

“Genocide denial is a manipulation of truth, it is a lie aimed at destroying more thoroughly the targeted group and at allowing for one particular instance of genocide to continue while opening the door for other genocides, against the same group or against other groups, to be committed.”²⁵⁰

She logically emphasises that international regulation on the denial is needed “also because it has to be acknowledged that denial concerns all cases of genocides, and not only the

²⁴⁶ There are also historians who claim the mass-deportations of the Soviet Union constituted a genocide, directed to the destruction of nations or ethnical groups. See e.g. Rahi-Tamm, A., „Küüditamised Eestis” (“Deportations in Estonia”) in Oksanen, S., Paju, I. (authors and eds.), „Kõige taga oli hirm” (“There Was Fear Behind Everything”), translation from Finnish to Estonian Jaanits, K., Kaer, K., Seinberg, T., Velbaum-Staub, I., Tallinna Raamatutrükikoda, 2010, pp 63-94, (original “Kaiken takana oli pelo”, Werner Söderstorm Ltd, Helsinki, 2009); from a legal perspective see e.g. Mälksoo, L., “Soviet Genocide? Communist Mass Deportations in the Baltic States and International Law”, Leiden Journal of International Law, Vol. 14, 2001, pp 757–787

²⁴⁷ Phillips, L., “EU rejects eastern states' call to outlaw denial of crimes by communist regimes”, Guardian, 21 December 2010, available at: <http://www.theguardian.com/world/2010/dec/21/european-commission-communist-crimes-nazism> [accessed 16/04/2014]

²⁴⁸ *Ibid*

²⁴⁹ Mälksoo, M., 2014, p 83

²⁵⁰ Fournet, C., 2007, p 89

Shoah.”²⁵¹ I see no reason why the same should not be valid concerning the crimes against humanity.

So, the Framework Decision is not protecting the ‘fragile factual truth’ from ‘manipulation out of the world’ for eternity. The legal memory supporting social one in the Decision does not guarantee the availability of objective knowledge about the past but only part of it. It realises the risk of sending a message that other genocides or crimes against humanity do not count as such, basically legitimising them and thereby also facilitating the oblivion in collective memory, distorting historical truth and imposing one historical picture being thereby a political tool not a ‘gentle civiliser,’ thereby also failing in preventive effect.

However, the memory laws in nation states have been adopted and applied independently from the Framework Decision. I will further have a look how they have been implemented by the ECtHR and some of the national courts.

2.4.2.2. Memory Laws in Court Practice

On an example of three big countries in Europe with long existence of denial-laws: Germany, France and Spain,²⁵² three main argumentations justifying the existence of such regulation in the light of freedom of speech (that is considered as an ultimate value and one of the pre-requisites for a democratic society) may be brought out:

- a) The distinction between opinions and factual utterances: “a value judgement contributes to the intellectual battle between opinions on a question on public interest” and should be favoured by the courts, whereas “the dissemination of a factual statement that the speaker knows to be false or when the speaker relies on a fact that has been proven to be false,” on the contrary, does not fall under the protection of the freedom of speech.²⁵³ Holocaust deniers are considered to “offer factual assertions whose notoriously untrue nature has been established beyond any doubt thanks to countless testimonies of eye-witnesses and documents, the evidence collected in numerous previous criminal proceedings and the findings of historical scholarship.”²⁵⁴ (Germany)

²⁵¹ *Idem*, p 95

²⁵² Spain has no specific Holocaust denial law anymore but a general prohibition of the glorification and justification of genocide with a requirement that the activity incites to that crime. A prohibition of ‘mere’ denial was declared unconstitutional by the Spanish Constitutional Court as not posing a threat or danger. See an elaboration on that in Pech, L., 2009, pp 23-26

²⁵³ Pech, L., 2009, p 12

²⁵⁴ *Idem*, p 13, referring to the Auschwitzlüge (Holocaust Lie) Case, Decision of 13 April 1994, BVerfGE 90, 241, p. 249

- b) “[T]he denial of Holocaust constitutes an abusive use of freedom of expression.”²⁵⁵ It is necessary to protect constitutional order, dignity and memory of the victims. (France)
- c) Although Spanish constitutional order is, according to the Constitutional Court based on human dignity, the Section 607 (2) of the Criminal Code, which is a provision of “international origin,” is not compatible with the freedom of expression and therefore it is not tolerable that “the mere transmission of ideas to be classified as a crime, not even in cases where those ideas are truly execrable, being contrary to human dignity.”²⁵⁶ Therefore denying as a non-dangerous act is not forbidden whereas justifying is.²⁵⁷ (Spain)

The idea of the right to truth seems most clearly reflected in the German approach. However, the objective knowledge, i.e. the right to truth is actually needed in all the circumstances. The protection of human dignity involves the protection of the memory of the victims and thereby the factual truth, the purposes of protecting the public order, peace and everyone’s rights involves an element of the prevention of the crimes in question. It was already argued above that knowledge must be available for the prevention. In case of such complex issues, involving the very human existence and all the underlying values of it, the availability of such knowledge, the seeking for the truth about it must be especially cautiously guaranteed, taking thus into account that the painfulness and feeling of embarrassment makes the truth about these crimes particularly fragile.

The argumentation of the Spanish court is definitely acceptable from the point of view of the freedom of expression. But allowing the denial as ‘non-harmful’, unless “expressed with the intentional objective of inciting to racial discrimination or hatred, pose a real risk to the pacific coexistence among citizenry or violate dignity of persons,”²⁵⁸ might reduce the means for prevention to zero: by the time the case gets to the court, the harm is already done. It should be logically not necessary to wait for the genocide to occur, in order to stop it. It is proper to remind here the point made by Koskeniemi that the intent in such cases is extremely hard to determine as even the ‘empires of evil’ of Stalin and Hitler were allegedly based on good intentions. Thus, as the dissenting judges, justifying the legitimacy of the repealed provision, noted, “past tragic historical experiences in Europe demonstrate that genocide deniers are motivated by antidemocratic as well as racist intent; finally, there is a

²⁵⁵ *Idem*, p 18

²⁵⁶ *Idem*, p 25, referring to Spanish Constitutional Court Judgement 235/2007

²⁵⁷ *Ibid*

²⁵⁸ *Idem*, p 26, referring also to decisions 241/1991 and 176/1995 of Spanish Constitutional Court

clear causal link between the denial of past genocides and the present commission of racist acts of violence.”²⁵⁹

As for the ECtHR, it should first be clarified that the freedom of expression is of very high value, a landmark case in this field, *Handyside vs. UK* sets a standard:

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".”²⁶⁰

In that light the approach to Holocaust denial cases has gone through a twofold approach²⁶¹: (a) assessing the legitimacy of the prohibition or other measures taken through a concept of margin of appreciation and paragraph 2 of article 10 that sets out that every limitation to the freedom of expression shall be “prescribed by law”, have a “legitimate objective” and be “necessary in a democratic society”²⁶²; and (b) being regarded as an abuse of rights under article 17 which strips the activity of any protection of the ECHR.²⁶³ The former approach gave a wide margin of appreciation to the nation states in deciding on sensitive issues, considering the Holocaust-denial legislations and implementation of them mostly ‘necessary in a democratic society.’²⁶⁴ The latter approach that has prevailed is more relevant for this research. I will bring out a few most important cases.

The first case where the court took a stance that the denial of Holocaust is ‘an abuse of rights’ and Holocaust was a “clearly established historical fact” was *Lehideux and Isorni vs France*:

“The Court considers that it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to

²⁵⁹ *Ibid*, footnote 73

²⁶⁰ ECtHR, *Handyside vs. UK*, 7/12/1976, 5493/72, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499>

²⁶¹ Articulated like that in Pech, L., 2009, p 26-39, put critically by the author “From a Low Standard of Scrutiny to the Absence of any Scrutiny”

²⁶² ECHR, art. 10 (2)

²⁶³ ECHR, art. 17: Prohibition of abuse of rights: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

²⁶⁴ See e.g. *X. vs Germany*, *T. vs Belgium*, *Honsik vs Austria*, *Marais vs France*, referred in Pech, L., 2009, pp 32-33

the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.”²⁶⁵ [emphasis added, M.R.]

The approach was implemented in *Garaudy vs France*, where the applicant was found to have ceased his rights under the ECHR:

“The book which gave rise to the applicant's criminal convictions analyses in detail a number of historical events relating to the Second World War, such as the persecution of the Jews by the Nazi regime, the Holocaust and the Nuremberg Trials. Relying on numerous quotations and references, *the applicant questions the reality, extent and seriousness of these historical events that are not the subject of debate between historians, but – on the contrary – are clearly established.* [...] There can be no doubt that *denying the reality of clearly established historical facts*, such as the Holocaust, [...] *does not constitute historical research akin to a quest for the truth.* The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history.”²⁶⁶ [emphasis added, M.R.]

Furthermore, the Court continues:

“[...]Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.”²⁶⁷

The court was unanimous in declaring the application for these reasons inadmissible. The prohibition of denial of ‘clearly established historical facts’ about crimes against humanity constitutes in itself a protection of factual truth (which the victims of crimes against humanity have a right to claim in the court). The court has repeatedly given such interpretation. Moreover, in *Lehideux and Isorni*, one of the reasons, why the court concluded that there had been a violation of the freedom of expression of the applicants, was the need to deal with a past in even if it is

“likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years

²⁶⁵ ECtHR Grand Chamber, *Lehideux and Isorni vs France*, 23/09/1998, 24662/94, para. 47, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58245>

²⁶⁶ ECtHR, *Garaudy vs France*, 24/06/2003, 65831/01, para. 1(i), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23829>

²⁶⁷ *Ibid*

previously. *That forms part of the efforts that every country must make to debate its own history openly and dispassionately.*²⁶⁸ [emphasis added, M.R.]

It is also clear from the decisions that a state has a positive obligation to protect this right by legal and judicial means.

The Research Division of ECtHR, based on this and similar case-law, has concluded that “it is an integral part of freedom of expression [...] to seek historical truth.”²⁶⁹ It is important to notice at this point that ECtHR has made decisions deriving from the same principle also on issues not dealing with Holocaust and Nazi crimes. For example, the court held that it was an infringement of the freedom of expression when a journalist, who was writing about the massive killings of Armenians by Turkish in 1915 and concluded that these acts constituted genocide, was convicted for “denigrating ‘Turkishness;’” the court stated inter alia: “In such societies, the debate surrounding historical events of a particularly serious nature should be able to take place freely, and it was an integral part of freedom of expression to seek historical truth.”²⁷⁰

Thus, the court has, in all the cases concerning the ‘clearly established historical facts’, although in the context of Holocaust used a phrase ‘such as Holocaust’. That means that Holocaust is just one and maybe currently the most prominent example but it is not the only one. Rather, in line with the argumentation of Torpey, the asymmetry towards remembering and recognising Holocaust is used as a paradigmatic case also for other comparable past crimes, like in a precedential decision *Kononov vs. Latvia*, discussed above.

The ECtHR, mostly reflecting the German courts’ approach towards denial- laws in relation to the freedom of expression, might be said to be implicitly but consistently applying *the general principle of the right to truth*. As Fournet argues about the practice of French courts:

“[A] close reading of the rulings [...] regarding genocide denial shows that, far from being willing to impose a particular historical truth, [...] courts sanction the confusion between historical knowledge and a messianic, propagandist discourse. In other words, [...] courts do not impose a particular truth or

²⁶⁸ *Lehideux and Isorni*, para. 55 In this case the applicants were debating on the Vichy government’s role in Nazi crimes and Marshal Philippe Petain’s possible “double game” with Nazis, not presenting that in a good light.

²⁶⁹ ECtHR, Research Division, “Cultural rights in the case-law of the European Court of Human Rights”, January 2011, p 21, available at: http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf [accessed 16/04/2014]

²⁷⁰ ECtHR, *Dink vs Turkey* (legal summary), 14/09/2010, joined applications 2668/07 6102/08 30079/08 et al., available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-808>

a particular vision of the truth but they do impose on historians ‘obligations of prudence, objective caution and intellectual neutrality’²⁷¹

2.5. Conclusion

As concluded in the Study on the Right to Truth, the right to the truth applies “in all situations of serious violations of human rights,” and its material scope gives the right “to seek and obtain information” on mainly such elements:

“the causes leading to the person’s victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.”²⁷²

The right to truth is not limited to the period of transition. It is substantiated by the nature of the acts having no ‘statute of limitation’ giving rise to the right to truth but also by very practical reasons. Conclusively, it might be said that the right to objective knowledge about one’s history belongs to every human being. It is possible to distinguish two ways of application of the right to truth:

- a) in an aftermath of a conflict or other grave violation of human rights in concrete cases for concrete victims or society, the right to truth applies as a norm of customary international law with very concrete content and application area.
- b) in peace-time, the right to truth serves as substance outside of political sphere, controlling and setting limits to the political persuasion, regulating the ‘market of opinions’ so that that factual truth is not manipulated out but remains a metaphysical basis for the opinions, i.e. applies as a general principle of international human rights law.

In peace-time, the truth about the events in question is regarded as historical truth and the right to truth, besides still actual principles of impunity and effective remedy, is mainly connected to freedom of expression, especially the freedom to seek and impart information; the protection of life, health and human dignity through fighting hate-crimes; protecting the memories and dignity of the victims and their heirs; and prevention of re-occurrence of past atrocities. In this context,

²⁷¹ Fournet, C., 2007, p 91, referring to Faurisson case where also UN Human Rights Committee (in both – main decision and concurring opinions agreed with the interpretation and approach of French court (see above)).

²⁷² Study on the Right to Truth, 2006, para. 38

“[t]he debate addresses the epistemological problem of *finding truth in history* and also the role government should play, the division of responsibilities between the legislature and the historian, the role of law, and access for all to objective knowledge of the past, which concerns nothing less than the theory and practice of democracy.”²⁷³ [emphasis added, *M.R.*]

The historical awareness, also called “self-awareness and capacity to control our lives places historical knowledge at the center of our moral and political concerns.”²⁷⁴ The central realm in these dynamics is the historical truth that forms a centre of the right to truth, setting limits to state’s activities during nation building and bringing thereby certain positive and negative obligations under human rights law.

The main *negative obligations*, based on the discussion above, could be considered: not restricting the freedom of expression and information, letting historians and public at large freely seek for the truth by allowing access to the state-held information, public debates, plurality of opinions; not imposing one historical picture as official state-approved history; not in any way distorting historical record (i.e. the facts about the past) when creating a narrative meant to form the national identity and collective memory; not excluding any group of society from the nation building process; allowing high academic freedom for historians.

The main *positive obligations* could be considered: creating an environment, including legislation and administrative measures, allowing dealing ‘with its own history openly and dispassionately’ (e.g. laws against racism and xenophobia, on academic independency of historians, on information-requests and access etc.); creating, sustaining and constant improving of archives and allowing wide public access to them; investigating past crimes and punishing the perpetrators through criminal proceedings; putting an effort in collecting new knowledge, exploring facts and making the results available for the society.

The right to truth does not concern the legal nature and classification of (f)acts. So the prohibition of the denial of communist crimes by criminal law does definitely not derive from the right to truth. What derives from the right to truth is the right of the society (in whichever geographic or national boundaries) and every single person to know the factual truth about past crimes. So, the impact of legal, political or historical activity on the availability of truth and objective knowledge about the past falls under its scope.

In large, memory laws are justified as ‘gentle civilizers’ of power-politics if they are aimed at protecting the historical truth from being ‘maneuvered out of the world,’ protecting thereby

²⁷³ Rémond, R., 2006

²⁷⁴ Gorman, J., 2004, p 113

the dignity and rights of the victims, their heirs and the whole society, including the prevention of repetition of past wrongs. On the contrary, the law has become a tool of politics and is not justified if it, instead of protecting factual truth, imposes one historical picture, using the power of legal memory to influence the social and individual. This is the principal threshold of the right to truth as a general principle of international law.

Despite declarative recognitions of Communist crimes on political level, on legal level one side of the European memory is clearly dominant, holding Holocaust and regretting the Nazi past as “the hegemonic mnemonic narrative”²⁷⁵ of common memory and harmonious coexistence of Europe. The criminalisation of one event and excluding another from the scope of the legal regulation creates legal memory that determines which events are being investigated, publicly discussed and consequently the availability of truth and objective knowledge about the past events. For the reasons discussed above, it might be said that the Framework Decision contradicts the principle of the right to truth: besides distorting the factual truth, it also infringes the individual side of the truth, the dignity of memory and the ‘duty to remember’ of the one plus one plus one of the many millions of victims of Communist crimes.

The central intuitive idea in European memory-politics appears to be the one expressed by Nazi-hunter Efraim Zuroff: “For all the terrible crimes of the USSR, you can’t compare the people who built Auschwitz with the people who liberated it.”²⁷⁶ There is at least one country holds the same assumption as a basis for its national identity. The next and last chapter explores whether the upholding of such, from one perspective truthful assumption, causes the distortion of factual reality in Russian memory politics or is the nation building there conducted in accordance with the right to truth.

3. Russia – heroism re-introduced (or still there)?

It is no secret that the very same period when the Communist crimes against humanity were committed was also a period of glory and most heroic acts in winning the WW II in Russian history. It is also no secret that Russia has been reluctant in acknowledging the darker side of its past, e.g. the *Kononov vs. Latvia* judgement was heavily criticised by Russia. The decision was called a “very dangerous precedent” that “seek[s] to revise the outcome of World War II and whitewash the Nazis and their accomplices” and “may be viewed as an attempt to draw

²⁷⁵ Mätksoo, M., 2014, p 85

²⁷⁶ Phillips, L., 2010

new dividing lines in Europe and to destroy the continent's emerging consensus on pan-European standards and values.”²⁷⁷

I will discuss the creation of collective public memory in Russia today to see whether the provision of historical narrative does sufficiently reflect ‘factual truth’ or is it rather implementing the “politics of forgetting” like the totalitarian SU, i.e. those facts not favourable to the official ideology are simply “airbrushed out of photographs, [...] excised from encyclopaedias and history books, as if they had never existed.”²⁷⁸ And eventually, answer the question: does Russia violate the right to truth in the process of nation building?

I will not deal with all the historical consciousness and record but, in line with the previous discussion, only with the part concerning Nazi and Communist crimes against humanity. I will present the general moods and tendencies forming the background and basis for memory politics and discuss two main areas in this context: memory laws and history education. For the latter I will have a look at one of the state approved history textbooks for 9th grade, choosing the one that has been re-printed and revised several times and is widely used. Two Russian history educators whom I have asked say that they use namely this author's book because it is “the most honest about repressions,” as one of them put it. I will also analyse the conception underlying the course on the same topic for 11th grade – “Russian history 1900-1945.”

3.1. Building New National Identity: Phoenix Rising from the Dust

In 1990s, after the collapse of the SU, in all countries concerned, a process of creation (or re-creation) of national identity took place – so in Russia. What makes Russia special in comparison to other post-Soviet countries is that all the other countries had something unifying to build their new identity upon (in addition to national culture, history and traditions) – mainly common suffering and the struggle for independence. For Russia the end of the SU also meant loss its ‘glory’ and status of an empire. Similarly to Germany as a successor of Third Reich, Russia as a successor of the SU was (and still is in many peoples’ mind) perceived as a ‘perpetrator state’, bearing the responsibility for embarrassing inhuman past. That it is not an easy base to build a common identity upon.

²⁷⁷ Mätksoo, L., 2011, p 105, referring to the official statement of Russian foreign ministry on 17 May 2010.

²⁷⁸ Adler, N., “In Search of Identity: The Collapse of the Soviet Union and the Recreation of Russia”, in Barahona de Brito, A., Consález-Enríquez, C. and Aguilar, P., “The Politics of Memory. Transitional Justice in Democratizing Societies”, Oxford University Press, New York, 2001, reprinted 2004, pp 275-302, p 275

Differently from Germany, Russia has never been apologetic, “the official Russian line denies the equivalence of Stalin and Hitler.”²⁷⁹ The collective national identity of Russia has in major part always contained a question about Russia’s (power) position in world-politics, especially in Europe. Throughout history Russia has sought its place, at some times declaring itself belonging to Europe (a member of a family of civilised nations or democratic countries), at some times talking about being very different (Eurasia concept, directed democracy idea), but in any case the patriotism and importance of being powerful, accepted and respected has been the central issue (imperialism, unifier and leader of Christian countries concept). Pointing out Russia’s shortcomings has almost always been something that hurts Russia’s stateliness because, as mentioned, Russia has always aimed to be taken grandeur²⁸⁰. It might be not too much to say that neo-imperialist ideology has settled itself as a part of Russian foreign policy²⁸¹ – making therefore the process of ‘internal legitimatisation’ of state’s international behaviour especially crucial from the standpoint of peace, security and human rights on global level.

On 25 March 2014 at a ceremony presenting prizes for young cultural figures Vladimir Putin stated: “In Russian society, it is necessary to form the kind of culture and values which could buttress our history and traditions, unite times and generations and allow for the consolidation of the nation.”²⁸² He was announcing the formulation of a report “Foundations of State Cultural Politics” which calls for the protection of “traditional Russian values,” according to the presidential advisor Vladimir Tolstoi, its main findings could be summarized as: “Russia is not Europe.”²⁸³

I will bring some abstracts from the speech of Mr. Putin in September 2013, exemplifying the general idea and tendencies underlying not only inner but also foreign policies and goals of Russia:

²⁷⁹ Mälksoo, M., 2009, p 667

²⁸⁰ See a more detailed and various view about the different philosophical concepts starting from Eurasian and nature related step-taiga concepts and ending with European and pan-Slavic ones in Herkel, A., „Vene mõistatus“ (“Russian mystery”), Ilmamaa, Tartu, 2007, see also Gecse, G., translation from Hungarian Kalvet, T., „Bütsantsist Bütsantsini: Suurvene mõttelaadi olemus“ (“From Byzantine to Byzantine: the Nature of the Big-Russian Thought”), Ajakirjade Kirjastus, 2012

²⁸¹ See e.g. writings on Eurasianism, nowadays leadingly advocated by influential Russian political thinker Alexander Dugin who is very much inspired by Nazi-era Germany’s philosopher Carl Schmitt: Dugin, A., “The Foundations of Geo-politics” (Osnovy geopolitiki: Geopoliticheskoe budushchee Rossii (Moscow: Arktogeya, 1997), 600 pp), reference in Dunlop, J. B “Aleksandr Dugin’s Foundations of Geopolitics”, <http://www.4pt.su/en/content/aleksandr-dugin%E2%80%99s-foundations-geopolitics>, see more on nowadays thought on Eurasianism: <http://www.4pt.su/en/topics/eurasianism> [accessed 27/02/2014]

²⁸² Golubock, D., G., “Culture Ministry Affirms 'Russia is not Europe'”, The Moscow Times, 7/04/2014, available at: http://www.themoscowtimes.com/arts_n_ideas/article/culture-ministry-affirms-russia-is-not-europe/497658.html [accessed 8/04/2014]

²⁸³ *Ibid*

“It is evident that it is impossible to move forward without spiritual, cultural and national self-determination. [...] For all the differences in our views, debates about identity and about our national future are impossible unless their participants are patriotic. Of course I mean patriotism in the purest sense of the word. [...] Too often in our nation's history, instead of opposition to the government we have been faced with opponents of Russia itself. [...] It's time to stop only taking note of the bad in our history, and berating ourselves more than even our opponents would do. [Self-]criticism is necessary, but without a sense of self-worth, or love for our Fatherland, such criticism becomes humiliating and counterproductive.”²⁸⁴

In 2012, the New York Times wrote:

“The pro-Western, modernizing doctrine of President Dmitri A. Medvedev has been replaced by talk about “post-democracy” and imperial nostalgia. One of the few clear strategies to emerge in recent months is an effort to mobilize conservative elements in society. Cossack militias are being revived, regional officials are scrambling to present “patriotic education” programs and Slavophile discussion clubs have opened in major cities under the slogan “Give us a national idea!””²⁸⁵

Carnegie Endowment led opinion poll in Russia in 2012 showed that popularity of Stalin has grown from 12% in 1989 to 42% in 2012 – this is the percentage of people that “named Stalin as the most influential historical figure.”²⁸⁶ Putin has restored many of the Soviet symbols, like flag and anthem, which most of the Russian people feel proud of – 66% and 65% respectively (according to the poll in 2005).²⁸⁷ According to the same poll, however, only 4% of people know the lyrics of the anthem by heart and 60% of the people feel proud of the coat of arms Russia, about which there is also the widest knowledge – 83%.²⁸⁸

To bring some examples from everyday life, in Moscow subway an old Soviet national anthem lyrics praising Stalin were restored as part of its interior decoration; the city of Volgograd issued a decree in the beginning of last year stating that the city should be renamed back to Stalingrad as it was before 1961 for “commemorating the historic WWII battle;” several local authorities “ordered images of Stalin to be put on city buses as part of

²⁸⁴ Putin, V., V., Speech at the tenth anniversary meeting of Valdai International Discussion Club in the Novgorod Region (translated by Russian President's official web-site Kremlin.ru), September 19, 2013, RT. Question More, 20/09/2013 [accessed 24/04/2014]

²⁸⁵ Barry, E., “Putin, in Need of Cohesion, Pushes Patriotism”, New York Times, 20/11/2012. <http://www.nytimes.com/2012/11/21/world/europe/vladimir-putin-pushes-patriotism-in-russia.html?pagewanted=all> [accessed 2/04/2014]

²⁸⁶ Isachenkov, V., “Joseph Stalin More Popular In Russia Now Than At End Of Soviet Union, Finds Carnegie Survey”, Huffington Post, 03/01/2013, available at: http://www.huffingtonpost.com/2013/03/01/joseph-stalin-more-popular-in-russianow_n_2791776.html [accessed 10/04/2014]

²⁸⁷ “Most Russians proud of national coat of arms, flag and anthem – poll”, RIA Novosti, 10/06/2005, available at: <http://en.ria.ru/society/20050610/40505631.html> [accessed 20/04/2014]

²⁸⁸ *Ibid*

festivities;”²⁸⁹ the pro-Kremlin youth organization Nashi (that calls itself anti-Fascist) claims that the falsification of history is the biggest threat for Russia today, against which they have organised several activities, e.g. the protest in front of Estonian embassy because of the replacement of a war remembrance statue in Tallinn or a project where SU veterans of World War II told their history.²⁹⁰

How does the legacy of massive terror of Communist regime fit into the historic narrative of the new national idea? According to Russian sociologist Lev Gudkov, one of the authors of the Carnegie opinion poll, it does not:

“Vladimir Putin's Russia of 2012 needs symbols of authority and national strength, however controversial they may be, to validate the newly authoritarian political order. [...] Stalin, a despotic leader responsible for mass bloodshed but also still identified with wartime victory and national unity, fits this need for symbols that reinforce the current political ideology.”²⁹¹

Putin is, according to Kremlin's critics by focusing “on the nation's Soviet-era achievements rather than Stalinist crimes,” whitewashing the image of Stalin.²⁹² Opposite to the ‘chaos’ of 1990's, when it was hoped that “a new national ideology, a development ideology, would simply appear by itself,” Putin is bringing an order and united vision that derives from the positive approach to history:

“We must be proud of our history, and we have things to be proud of. Our entire, uncensored history must be a part of Russian identity. Without recognising this it is impossible to establish mutual trust and allow society to move forward.”²⁹³

Liñán describes the process as a “propaganda discourse that rather than shedding light on the past, accuses those who question Russia's greatness of lying.”²⁹⁴ In short term, he admits, the aggressive propaganda has proved to be beneficial for Putin's political purposes but in the long run, he believes, “it will become tiresome and come against stubborn reality.”²⁹⁵ This conclusion vibrantly resembles Arendt's idea of substituting the whole factual reality by

²⁸⁹ Isachenkov, V., 2013

²⁹⁰ Von Gall, C., 2011, p 302; see also Всероссийский проект «Наша общая Победа» (All-Russian project “Our Common Victory”), a project for growing patriotic youth and against the “attempts of falsifying history damaging Russian interests” (инструмент противодействия попыткам фальсификации истории в ущерб интересам России), available at: <http://www.41-45.su/> [accessed 27/04/2014]

²⁹¹ Isachenkov, V., 2013

²⁹² *Ibid*

²⁹³ Putin, V., 2013

²⁹⁴ Liñán, M. V., “History as a propaganda tool in Putin's Russia”, *Communist and Post-Communist Studies*, Vol. 43, 2010, pp 167–178, p 177

²⁹⁵ *Ibid*

manipulating factual truth out of the world. Let us further see, how much does the ‘stubborn reality’ have chance to persist in this process.

3.1. New Old Enemies

The 20th century crimes against humanity on the EU-level have been dealt with in the Framework Decision, in the context of fighting racism and xenophobia. The search for national identity under Putin’s leadership aims at “rebuilding of Russia’s ties with its history” because, as Russian political scientist Sergei Karaganov puts it, “[o]ur country was formed around defense, and all of a sudden there is no threat.”²⁹⁶

In the light of the abovementioned UN expert report on minority rights the recommendations of the monitoring body of the Framework Convention for the Protection of National Minorities (hereinafter *FCNM*) of the Council of Europe on the minority rights in Russia in 2013 gives an impression that national minorities could be regarded as a new ‘threat’. All the recommendations for ‘immediate action’ carry more or less the following spirit:

“Take more targeted measures to prevent, investigate, prosecute and sanction effectively all instances of racially motivated offences; condemn firmly all expressions of intolerance, racism and xenophobia, particularly in politics and in the media; *redouble efforts to combat the dissemination of racist ideologies in the population, particularly among young people.*”²⁹⁷ [emphasis added, *M.R*]

It would not be a big surprise regarding the ‘disobedient’ minorities, like for example Chechens and other Caucasus peoples.²⁹⁸ But, as the Report brings out under the section of ‘concerns’, “the number of racially-motivated offences remains alarming,” targeting not only persons from “Central Asia, the Caucasus, Asia and Africa” but also Roma.²⁹⁹ The “expressions of Islamophobia and anti-Semitism” that are according to the Report “frequently

²⁹⁶ Barry, E., 2012

²⁹⁷ Committee of Ministers, Council of Europe, *Resolution CM/ResCMN (2013) 1 on the implementation of the Framework Convention for the Protection of National Minorities by the Russian Federation*, 30 April 2013, available at: <https://wcd.coe.int/ViewDoc.jsp?Ref=CM/ResCMN%282013%291&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> [accessed 5/04/2014]

²⁹⁸ See e.g. Sukhov, I., “Just How Far Is Boston from the North Caucasus? The problems of the North Caucasus are not only problems for Russia.”, *Diplomaatia Special Edition*, May 2013, available at: <http://www.diplomaatia.ee/en/article/just-how-far-is-boston-from-the-north-caucasus/> [accessed 5/04/2014] “Russia has long exaggerated the role of external factors in the North Caucasus. An external enemy was needed to avoid having to come to a traumatic realisation: that the North Caucasus *kasha* is a dish made in a local kettle with local ingredients, with the “fire” under the pot fuelled by connivance of the federal authorities. Moreover, presenting the campaign in this way allowed Russia to respond to Western human-rights complaints by saying: “We are fighting the same enemy in the Caucasus that you face in Iraq and Afghanistan, and so you yourselves know how a little toughness with them goes a long way.”

²⁹⁹ Report on FCNM

reported”, “instances of interethnic clashes,” are “sometimes fuelled by local politicians and the media. There is an increasing use of xenophobic and racist rhetoric by some politicians and the reaction of the authorities to racist statements has not always been adequate.”³⁰⁰ Furthermore, according to the Report “media disseminates prejudice, sometimes hate speech, regarding some minority groups, [...]” like the ones named above.³⁰¹ Drawing from the recent events in Ukraine and the aggressive propaganda carried out by Russian state controlled media-channels³⁰², it might be claimed that also nations outside Russia (foremost the majority nations of the countries of the former Soviet Union) are projected as enemies, thereby justifying Russia’s acts of aggression in these territories.³⁰³

The old enemy – West, especially US, is also still on the picture. This finds confirmation in the latest Russian official foreign-political documents where NATO enlargement and West’s arguable non-compliance with international law have been named among threats to Russian national interests that need balancing and protection.³⁰⁴

In an interview on March 2nd 2014 a former advisor of Russian president, Mr. Andrei Illarionov emphasised some crucial points for stopping Russian government to go further with its actions in Ukraine (that are directed to evoking civil war), among others he said that it is extremely important to establish Press Centre where journalists broadcast the events taking place in Ukraine in English (to let the world know what is going on) and in Russian because the very important allies of Ukrainians are Russian citizens “who hate the regime that provokes brother-killing war, who do not and will not believe wrongful information.”³⁰⁵ This

³⁰⁰ *Ibid*

³⁰¹ *Ibid*

³⁰² See e.g. Snyder, T., “Fascism, Russia, and Ukraine”, The New York Review of Books, March 2014 Issue, available at: http://www.nybooks.com/articles/archives/2014/mar/20/fascism-russia-and-ukraine/?fb_action_ids=10203374401267152&fb_action_types=og.likes&fb_source=other_multiline&action_object_map=%5B413616652105754%5D&action_type_map=%5B%22og.likes%22%5D&action_ref_map=%5B%5D [accessed 19/03/2014] “The protests in the Maidan, we are told again and again by Russian propaganda and by the Kremlin’s friends in Ukraine, mean the return of National Socialism to Europe. The Russian foreign minister, in Munich, lectured the Germans about their support of people who salute Hitler. The Russian media continually make the claim that the Ukrainians who protest are Nazis. [...] The current Russian attempt to manipulate the memory of the Holocaust is so blatant and cynical that those who are so foolish to fall for it will one day have to ask themselves just how, and in the service of what, they have been taken in. If fascists take over the mantle of antifascism, the memory of the Holocaust will itself be altered. It will be more difficult in the future to refer to the Holocaust in the service of any good cause, be it the particular one of Jewish history or the general one of human rights.”

³⁰³ For a very pessimistic viewpoint see e.g. Applebaum, A., “Putin invaded Crimea because Putin needs a war”, National Post, 21 March 2014, available at: <http://fullcomment.nationalpost.com/2014/03/21/anne-applebaum-putin-invaded-crimea-because-putin-needs-a-war/>

³⁰⁴ See e.g. Mälksoo, L., “International Law in Foreign Policy Documents of the Russian Federation: A Deconstruction”, in Kasekamp, A., Estonian Foreign Policy Yearbook, The Estonian Foreign Policy Institute, 2010, pp 43-59

³⁰⁵ Putin’s ex-advisor’s interview to Ukrainian TV-channel, <https://www.youtube.com/watch?v=IrvBhCKL3WY#t=216>

advice illustrates the above-described force of propaganda and lack of impartial information in Russian media. This is the point where the question of the right to truth strongly comes in.

Are many Russian citizens approving their country's aggressive actions abroad because of the mysterious 'Russian soul' that has imperial aspirations and need for strong state 'codified' inside? As shown above, the reasons are more Earthly: the 'Russian soul' is being vigorously chiselled in the face of Russian government's political purposes. This is how Russia, by creating a collective national identity and thereby all the individual identities, builds an 'internal legitimization' for its actions abroad, creating enemies and fighting them.

If the EU Framework decision simply 'leaps on leg' on legislative level but still admits the crimes in some official documents and publicly deplores all the crimes for the sake of Eastern and Central European member states, Russia does not need to compromise with anyone in its memory politics. The old and new enemies, 'minimising' Russian effort in anti-Hitler coalition and 'degrading' its win in Great Patriotic war, need to be fought, similarly to the ones in the 'traitors' in 'Fifth Column'³⁰⁶ criticizing Russia's actions in Ukraine. This is the underlying attitude reflecting in Russian memory politics.

3.2. Memory Laws and Politics of Russian Federation – Place for Re-Birth of National Pride

In 2008 an *ad hoc* commission – “Commission to Counteract the Falsification of History to the Detriment of Russian Interests” (Commission) – which used many different channels and also measures of “markedly symbolic nature” (like reform of national symbols, recuperation of Soviet national anthem, bringing in new holidays to celebrate, art, museums) in its campaign³⁰⁷ – was established. The Commission is not active anymore but its work is carried on by different means.

Alongside with the work of the Commission two draft-laws have been discussed in the Duma: “Countermeasures Against the Rehabilitation of National-Socialism, National-Socialist Perpetrators and Their Collaborators in the Newly Independent States on the Territory of the Former Soviet Union” and an amendment proposal of the Criminal Code which would

³⁰⁶ See e.g. Kates, G., “‘Traitors’ Slur Goes Mainstream In Russia”, Radio Free Europe. Radio Liberty, 26/03/2014, available at: <http://www.rferl.org/content/russia-nationalism-traitors-crimea-media/25310606.html> [accessed 20/04/2014]; From the point of view of a person on the list, an example how objectively expressed ‘patriotism’ does not mean anything if a person expresses views contrary to state propaganda on Ukraine, see Babchenko, A., “Про пятый пункт и пятую колонну” (“On Fifth Point and Fifth Column”), Журнал Аркадия Бабченко, 14/04/2014, available at: <http://starshinazapasa.livejournal.com/782370.html> [accessed 21/04/2014]

³⁰⁷ Liñán. M. V., 2010, p 169-170; see also Von Gall, C., 2011, pp 298-300

criminalise the denial of Nazi crimes³⁰⁸ and, in its initial version also (*sic!*) “any attempt to designate as criminal the actions of the countries of the anti-Hitler alliance.”³⁰⁹ The initial proposal for the criminal law amendment from the leading party United Russia was introduced in Duma in 2009 as a reaction to the moving of the ‘unknown Soviet soldier’ to the military cemetery in Estonia in 2007.³¹⁰

The scope of the regulation of both drafts is clearly restricted with the acts committed in Germany in 1933-1945 as qualified at the Nuremberg tribunal. Without that restriction it would apply also for crimes of the SU. While the draft-laws concern very wide and undefined range of people (the term “collaborators” could mean almost anyone), the responsibility for communist crimes has put on a narrow circle of people in power that time (decision of the Constitution Court of Russia from 30/11/1992).³¹¹ Both texts are more political than juridical, emphasising the status of Russia as a legal successor of the SU and re-glorifying the effort of the SU in united anti-Hitler coalition.³¹² The political nature of the drafts is also proved by the reading and adopting of the Criminal Code changes in fastened procedure to guarantee its coming into force by May 9th, “which should be symbolic.”³¹³ Thus in its adopted version it also prohibits “desecration of the symbols of war honour.”³¹⁴

Another field where Commission’s legacy continues living is education. The Commission claimed that the history lessons and partly also history science lacked quality because there was no clear orientation in many of the new publications and the history falsification served political purposes and the purpose of deterioration of Russia in some “pseudo-scientific” texts.³¹⁵ The “right” history education is claimed to be necessary. A member of the fraction of “United Russia”, Zatulin argues that as there must be a warning on a pack of cigarettes about

³⁰⁸ Von Gall, C., 2011, pp 288-298

³⁰⁹ Koposov, N., “Historical memory laws in Russia and Eastern Europe”, Text of a speech delivered by Nikolai Koposov at the *Liberté pour l’histoire* General Assembly in Paris, 21 May 2005, available at: http://www.lph-asso.fr/index.php?option=com_content&view=article&id=163%3Ales-lois-memorieelles-en-russie-et-en-europe-de-lest&catid=53%3Aactualites&Itemid=170&lang=en [accessed 23/04/2014]; see also Koposov, N., “The debate in Russia over the “history” laws”, St. Petersburg, 5/07/2009, available at: http://www.lph-asso.fr/index.php?option=com_content&view=article&id=73%3Ale-debat-russe-sur-les-lois-memorieelles&catid=31%3Adossier-russie&Itemid=78&lang=en [accessed 23/04/2014]

³¹⁰ *Ibid*

³¹¹ Von Gall, C., 2011, p 294

³¹² *Idem*, p 292-293

³¹³ Корченкова, Н., Городецкая, Н., Самохина, С., Иванов, М., „Оправдание нацизма уходит от ответственности. Совет федерации не во всем согласен с Госдумой“ (“The Justifying of Nazism Moves out of Responsibility. Federal Council not Agreeing with State Duma in Everything”), “Коммерсантъ” №73 от 28.04.2014, стр. 1; for critique in same line see Mishina, E., “The Duma’s Problem with Historical Memory”, Institute of Moder Russia, 19/02/2014, available at: <http://imrussia.org/en/rule-of-law/669-the-dumas-problem-with-historical-memory> [accessed 20/04/2014]

³¹⁴ *Ibid*

³¹⁵ *Idem*, p 303

the dangers of smoking, the state must warn about the dangers which books may contain.³¹⁶ A historian, Galina Zvereva claims that not historians but Kremlin political-technologists determine the conception of history textbooks in today's Russia.³¹⁷ "In this way," she says "a reproduction of mythological constancies, such as uniqueness of collective experience and national character (mentality) of Russians, nativeness, inherent heroism and spirituality of Russian nation, takes place."³¹⁸

3.3. History Education

Putin sees education as an essential part of the national identity creation in Russia: "The role of education is all the more important because in order to educate an individual, a patriot, we must restore the role of great Russian culture and literature. They must serve as the foundation for people's personal identity, the source of their uniqueness and their basis for understanding the national idea."³¹⁹

Part of historic narrative of the national idea is definitely the evilness of the Nazism and Fascism. The textbooks, both on world and Russian history contain headlines and phrases like 'threat of Fascism', 'victory over Fascism' or 'freeing the Europe from Fascism'.³²⁰ Nazi regime and Fascism are described in darkest colours. For example, there is a videotaped lecture from the speaker of the lower house of the Duma Sergei Naryshkin, which is being showed in schools and which describes the long ago Western occupiers to the accompaniment of dark orchestral music and images of a dead village girl, blazing wood cabins and a cowering child.³²¹

The Communist atrocities on the other hand find no mentioning in the world history book. In the very new textbook "Russian History of 20th-beginning of 21st Century"³²² they are mentioned but very shortly and in a rather laconic manner, more like 'passing by' as one of the Russian history teachers told me. For example GULAG is mentioned in the 9th grade textbook as system that was established in the interests of economy and work-discipline,

³¹⁶ *Idem*, pp 303-304

³¹⁷ Zvereva, G., "Die Konstruktion einer Staatsnation: Geschichtslehrbücher für das neue Russland", in Karl, L., Polianski, I., J., (Eds.), "Geschichtspolitik und Erinnerungskultur im neuen Russland", Göttingen 2009, pp 87-118, p 114, in Von Gall, C., 2011, footnote 63, p 304

³¹⁸ Zvereva, G., 2009, p 101, in Von Gall, C., 2011, footnote 66, p 305

³¹⁹ Putin, V., 2013

³²⁰ E.g. in Волобуев, О.В., Пономарев, М.В., Рогожкин, В.А., "Всеобщая история. XX - начало XXI века", 11 класс. Базовый уровень ("General History. 20th-beginning of 21st century", 11th grade, basic level), 2nd revised edition, Drofa, Moscow, 2012

³²¹ Barry, E., 2012

³²² Данилов, А.А., Косулина, Л.Г., Брандт, М.Ю., "История России. XX — начало XXI века", 9 класс ("History of Russia. 20th-beginning of 21st century, 9th grade), Prosvjeshenie, Moscow, 2013. The following is based on this book pp 132-270

mentioning how cheap and effective the construction of Belamour canal was with the workforce of prisoners. Repressions, similarly to GULAG, are mentioned in the context of economic reforms, the so-called five-year plans, there is one sentence that laconically states that repressions were the government's reaction to low work discipline and productivity, hooliganism and drinking.

In the context of collectivisation it is mentioned that Stalin decided to "liquidate Kulaks as a class"³²³ and that millions of people were deported to forced labour. But also that 'Kulaks' land was needed as basis for new economy. The hunger of 1932-1933 is also mentioned and it is admitted that the state forbid to remind the hunger through mass-information channels, denied the problem and exported cereal while many millions of people died. Ukraine finds no separate mentioning in this context. There is a section in the book dedicated to mass repressions of Stalin³²⁴ that mentions the so-called five-grain-law which considered taking five grains of cereal a theft, a crime against state possessions, and allowed capital punishment for it; it focuses mainly on show-trials and immediately implemented death-punishments over political opponents and their families but says nothing about deportations in inhuman conditions or working in the deadly labour-camps. According to the author, 3,8 million people were repressed during 1930-50, in 1920's and 30's.

Deportations from other countries, also Baltics, are mentioned in the context of national politics of the SU during the war. The statement that "over 50 thousand Lithuanians, Latvians and Estonians" were deported to Siberia"³²⁵ is preceded by a section about nationalist movements in Ukraine, Baltics, Crimea, Belarus, mountain areas of Chechen-Ingush regions which explains that "[e]vents occurred where armed nationalist groups attacked either retreating or surrounded Red Army,"³²⁶ and that Germans tried to take those movements under their control in order to weaken the Red Army. The book also discusses new wave of violence after the war, mentioning the special camps for those convicted in "anti-Soviet activity" or "counter-revolutionary acts" and violent deportations of previous war-prisoners of "freed territories" and "hostile elements" from Baltic countries, Western Ukraine and Belarus.

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³²³ *Idem*, p 173

³²⁴ *Idem*, p 182-183

³²⁵ *Idem*, p 237

³²⁶ *Idem*, p 236

³²⁷ *Idem*, p 257

In an overall context the book pretty much reflects the spirit presented in the conception underlying the construction of the course “History of Russia 1900-1945” for 11th grade.³²⁸ The conception, before going to the content part, states that the new approaches of Russian historians, deriving from the perspective of “the protection and strengthening of the state sovereignty, growing a citizen-patriot of Russia”³²⁹ form the methodological basis of the new textbook. As for the content part, the conception sets forth the importance of explaining the Bolshevik terror during civil war in its “objective nature in current historical conditions,” that there was no organised hunger and the massive collectivisation was “simply another alternative possibility for solving the problem of finding resources for the industrialisation that NEP was not capable of.”³³⁰

And although it was harsh on villages, another option for solving the problems “simply did not exist.”³³¹ Concerning the massive terror of Stalin, it is concluded that “Stalin acted in concrete-historical situation (as a commander) totally rationally – as a guardian of the system, as a consistent supporter of the transformation of the country into an industrial society managed from a united centre, as a leader of a country threatened by a war in the nearest future.”³³² As for the number of the victims, Danilov considers the most accurate to take into account only the ones executed and repressions during Great Patriotic War are regarded as necessary measures for “preventing looting and alarmism, strengthening the labour discipline and performance”³³³ (which is contrary to all historical evidence on death camps and other terror outcomes).

Anyhow, it is considered much more important is to ask in the textbook, what was achieved in 1930’s. The central place in the textbook belongs to “manliness and heroism of Soviet people” which differently from other warring countries “held a massive nature.”³³⁴ Thus, it is emphasised that “the attempts to present the traitors of the Motherland as heroes” shall be discredited in the textbook. Concerning the meaning and price of the victory, “the accent shall lay namely on the meaning and significance of the victory.”³³⁵

³²⁸ On a Conception of the Course “Russian History 1900-1945”, prepared by a group of authors under supervision of prof. Aleksandr A. Danilov, chair of history department in Moscow State Pedagogical University (О концепции курса «История России. 1900-1945 гг.»), available at: http://history.standart.edu.ru/info.aspx?ob_no=15378 [accessed 23/04/2014] The following is based on the conception.

³²⁹ *Ibid*

³³⁰ *Ibid*

³³¹ *Ibid*

³³² *Ibid*

³³³ *Ibid*

³³⁴ *Ibid*

³³⁵ *Ibid*

3.4. Conclusion

To sum up let us come back to the question about the right to truth in interaction with the right to informational-emotional self-determination and identity building. Memory and education politics in the modernisation process of Russia are carried by the collective identity building – the concept of unifying national idea. A prominent figure in Russian cinema sphere and supporter of Putin Nikita Mikhalkov has said that “the making of films along the lines of the Hollywood model in terms of the creation of national heroes and defence of all important values [is] a question of “national security.””³³⁶ In the same line, the memory laws and state-approved history writing in school books serve solely political aims. Using an expression from a master thesis on human rights culture in Russia, it can be concluded that history and memory have been successfully ‘securitised’ in Russia.³³⁷

In other words, the fields of law and education, meant to hold the truth and truthfulness as the highest criterion, do not fulfil their aim. The overall situation gives ground to conclude that Russia in its nation building activities has exited the legitimate area and is simply manipulating part of its past reality out of the world, violating thereby the rights of the victims, their heirs and general society to know the historical truth. As a Russian columnist Leonid A. Radzikhovski claims, “the only possible adjective for the word ‘Russia’ is Great Russia [velikaya]. No other adjective has a place [...] *officially it is prohibited, totally prohibited, to feel anything else but enthusiastic admiration.*”³³⁸ [emphasis added, M.R.]

Conclusion

This thesis, inspired by the on-going intense propaganda in Russian media that has succeeded to legitimise the aggression in Ukraine (and did the same in Georgia) and the fact that the neo-imperialist attitudes are largely driven by the myth of Great Patriotic War and Russian role as one of the Great Powers in anti-Hitler coalition, attempted to seek answer to the question, how far can a state go in producing such myths and whether the ‘air-brushing’ of certain unwelcome past legacy, is anyhow restricted from outside the political power-struggles. As the creation of historical narrative and building of national identity, aimed at providing a unifying basis for the people to feel part of their country, have a sense of patriotism,

³³⁶ Liñán. M. V., 2010, p 174, referring to Mikhalkov, N., “The function of a national cinema”, in Beumers, B. (Ed.), “Russia on Reels. The Russian Idea in Post-Soviet Cinema”, I. B. Tauris Publishers, London, NewYork, 1999, pp.50–53, p 51

³³⁷ Preclik, P., 2009, p 227 *et seq.*

³³⁸ Liñán. M. V., 2010, p 176

necessarily leads to influencing the very private and personal sphere of individuals – personal identity and memory – the realm to look for such restriction could logically be human rights.

Indeed, human rights law and international humanitarian law explicitly establish the right to know the truth about the fate of a person in case of enforced disappearances. The concept has developed further in the discipline of transitional justice and taken a rather concrete and comprehensive form, entitling individuals and collectives (the whole society) to know the truth about the genocide, crimes against humanity or comparable gross violations of human rights that have taken place in the society.

The fact that transitional justice has limits and revealing the full truth in its whole depth and complexity takes time and often presumes distance, the *jus cogens* nature of the norms giving rise to the right to truth, its origin in acts that have no statute of limitation leads to the conclusion that the right to truth also applies beyond transitional period in peace-time societies. The wide practice of adopting memory laws, court practice implementing them, high level political debates on historical truth and the relationship between historic freedom, freedom of expression and state's duty to use legal memory for sustaining the social but also the 'intrinsic value' of truth in the legal system leads to the conclusion that right to truth in peace-time functions as a general principle of international human rights law. The wide range of substantial values, like the need to protect the memory and dignity of the victims, their heirs, and whole humanity, the influence on the historical consciousness on the peaceful co-existence of people in different societies and of states in international arena confirms this conclusion and shows the need for open and dispassionate dealing with the past.

Examining various legal literature, international and national legislature and court practice, legal-philosophical and political writings, this thesis makes a distinction between two main types of truth: narrative and factual. The latter, understood as record of events, circumstances, evidence in the way they were, i.e. the factual reality of the past, falls under the protection of the right to truth. The narrative truth is protected under the right to truth as much as it must be in compliance with the forensic truth.

It is important to note that the right to truth does not mean remembering at any cost, it does not mean making impossible the necessary forgetting. On the contrary, by setting limits to political manipulation of memory, it enables not only remembering but also forgetting. Coming back to the posed question in the introduction, what does a command 'Remember!' mean, the author answered himself. His answer well reflects the legal content of the 'duty to

remember' via the right to truth as defined in this thesis, encompassing substance, idea and practical importance of this right:

“Remembering – starchy or not – may seem to be a suitable answer for denying. As hiding, optional presentation of information and forced forgetting was an inseparable part of daily functioning of the totalitarian regimes, the appeals to remember and save from the oblivion turned into resistance acts on their own. With over-reacting such resistance may become a real cult of memory, ceremonial holding on the past, that does not let it go. For the reconciliation of previously hostile national groups and melting them into one community, we sometimes have a duty to forget – to investigate, interrogate and read, to write down, to make the denial of what happened impossible, to mourn [...] and finally ... forget.”³³⁹

³³⁹ Kalmo, H., 2009, p 120 [my translation from Estonian]

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Õigus tõele – ettearvamatute mineviku leebe tsiviliseerija

Resümee

Käesolev magistritöö on suunatud ühele osale rahvusliku identiteedi kujundamisest – ajaloolisele narratiivile. Sündmused tänases Ukrainas (ja mõned aastad tagasi Gruusias) said suuresti võimalikuks Venemaa eduka propaganda tulemusel, mis osana rahvusliku identiteediloome protsessist legitimeerib agressiivse välispoliitika kui osa Venemaa rahvuslikust huvist võitluses „natsismilembese“ Ukraina valitsuse ning fašismi ja moraalsesse dekadentsi kalduva Lääne vastu. Teine Ilmasõda on keskseks osaks Venemaa rahvuslikus identiteedist, erinev arusaam toimumust, ohvritest ja kommunismikuritegudest on üheks olulisemaks takistuseks Eesti venekeelse elanikkonna integreerumisel.

Nähes seost indiviiduaalse ja kollektiivse rahvusliku identiteedi ning ajaloolise narratiivi vahel, nende mõju riiklikule ja rahvusvahelisele julgeolekule, inimsusevastaste kuritegude ohvrite ja nende järeltulijate ning kogu ühiskonna õigust ajaloolisele mälule, tekib põhjendatud ootus, et rahvusvaheline õigus peaks sisaldama piirangut ajalooliste faktide manipuleerimisele. Kuna kõnealune manipuleerimine puudutab sügavalt inimese väga isiklikku ala, tema identiteedi kujunemist, siis otsib antud magistritöö seda piirangut inimõiguste valdkonnast kui mõjusaimast riigi suveräänsust piiravast distsipliinist.

Õigus tõele on leidnud *expressis verbis* väljendust ja käsitlemist rahvusvalise humanitaarõiguse ja üleminekuajaõiguse kontekstis, puudutades algselt kitsast valdkonda – teadmata kadunuks jäämise juhtumeid. Tänapäevaks on see õigus leidnud tunnustust tunduvalt laiemalt nii individuaalse kui ka kollektiivse õigusena saada tõest informatsiooni ühiskonnas aset leidnud inimsusevastaste kuritegude või võrreldavate suurte inimõiguste rikkumiste kohta. Õigust tõele peetakse tulenevaks *jus cogens* normidest ning nende normide rakendamise eelduseks. Rahuaja kontekstis väljendub see eelkõige nn kohustuses mäletada, mis täna realiseerub ajaloolist mälu puudutavas seadusandluses ja selle interaktsioonis sõna-, mõtte- ja väljendusvabadusega, olles vajalik nii ohvrite ja nende järeltulijate kui kogu ühiskonna inimväärikuse ja õiguste tagajana, suunatuna verise ajaloo kordumise vältimisele.

Õigus tõele inimsusevastaste kuritegude kohta seab piirid ajaloolise narratiivi loomisele rahvusliku identiteediloome protsessis, keelates faktilise tõe, selgelt tõendatud ajalooliste faktide moonutamise või kollektiivsest mälust välja manipuleerimise ning tuues riigile kohustuse soodustada ja võimaldada avatud ning objektiivset mineviku käsitlemist ühiskonnas.

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